TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1908.

No. [redacted]51

L. P. KINDRED ET AL., APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MAY 15, 1909.

(21,679.)

(21,679.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 223.

L. P. KINDRED ET AL., APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1910.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1908, of said Court, before the Honorable Walter H. Sanborn and the Honorable William C. Hook, Circuit Judges, and the Honorable John F. Philips, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-ninth day of July, A. D. 1907, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, wherein L. P. Kindred, et al., were Appellants, and the Union Pacific Railroad Company was Appellee, which said transcript of record, as printed pursuant to the stipulation of counsel for the respective parties for use of the Court upon the hearing of said cause, is in the words and figures following, to-wit:

a United States Circuit Court of Appeals,
Eighth Circuit.

L. P. Kindred, et al., Appellants,
vs.
Union Pacific Railroad Company, Appellee.

Stipulation as to Printing Record.

The parties to the above entitled cause by their solicitors hereby stipulate and agree that the Clerk in printing the transcript of the record in this cause, shall omit the printing of certain portions thereof which are not necessary for the consideration of the United States Circuit Court of Appeals, which portions to be omitted now appear in the transcript of record and are as follows:

1. On pages 4, 16, 22, 30, 34, 36, 41, 43, 57, 85, 86, 88, and 89; where the title of the cause as it appeared in the Circuit Court is given, omit all of the names of the defendants except the first, and print the defendants as "L. P. Kindred, et al."

2. Omit verification and endorsements of bill of complaint on page 11; chancery subpoena and return on pages 12 and 13; injunction bond and endorsements on pages 14 and 15; order and endorsements page 18; chancery subpoena pages
b 19 and 20; order page 21; order on pages 22, 23 and 24; order on pages 25, 26, and 27; motion and endorsements on page 40; order and endorsements on page 29 [59].

A. M. HARVEY,
EDWARD D. OSBORN,
FRANK DOSTER,
Solicitors for Appellants.

N. H. LOOMIS,
R. W. BLAIR,
H. A. SCANDRETT,
Solicitors for Appellee.

No. 2671. United States Circuit Court of Appeals, Eighth Circuit. L. P. Kindred, et al., Appellants, vs. Union Pacific Railroad Company, Appellee. Stipulation as to Printing Record. Filed Jul. 29, 1907. John D. Jordan, Clerk.

1 In the United States Circuit Court of Appeals, for the Eighth Judicial Circuit.

Union Pacific Railroad Company, Complainant,

vs.

L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDaniel, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, ... Aldridge, John Burns, B. Friedburg, John B. Rees, C. F. Barker, Thomas Warren, Mrs. L. S. Bowers, P. H. Kaughns, Charles Sandberg, Edwin Taylor, J. G. Grooves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Ida Harvey, ... Harvey, ... Kanopp, C. M. Miller, and ..... Proudy, Defendants.

Citation.

United States of America—ss.

The United States of America to the Union Pacific Railroad Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Judicial Circuit at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date pursuant to an appeal filed in the clerk's office of the United States Circuit Court for the District of Kansas, First Division, wherein L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDaniel, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, ... Aldridge, John
2 Burns, B. Friedburg, John B. Rees, C. F. Barker, Thomas Warren, Mrs. L. S. Bowers, P. H. Kaughns, Charles Sandberg, Edwin Taylor, J. G. Grooves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Ida Harvey, ... Harvey, ... Kanopp, C. M. Miller, and ..... Proudy are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal meationed should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. John F. Philips, Judge of the Circuit Court of the United States for the District of Kansas (assigned) First Division, this 16th day of July, 1907.

JNO. F. PHILIPS,

Judge of the Circuit Court of the United States for the District of Kansas (assigned).

Service acknowledged this 17th day of July, 1907.

N. H. LOOMIS,
Soler. for Union Pacific Rld. Co., Comp.

3 No. 8300. In the United States Circuit Court of Appeals, for the Eighth Judicial Circuit. Union Pacific Railroad Co., Complainant, vs. L.P.Kindred et al., Defendants. Citation. Filed July 17, 1907. Geo. F. Sharitt, Clerk.

4 In the Circuit Court of the United States for the District of Kansas First Division.

Union Pacific Railroad Company, Complainant.
vs.
L. P. Kindred, et al., Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas, First Division:

Union Pacific Railroad Company, a corporation organized under and by virtue of the laws of the State of Utah, and a citizen of said State, brings this its bill of complaint against L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, E. A. Rhea, H. W. Rhea, Charles Bergman, ... Aldridge, John Burns, John B. Rees, Thomas Warren, and Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Grooves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Ida Harvey, ... Harvey, ... Kanopp, C. M. Miller and ..... Prondy, citizens of the State of Kansas and B. Friedburg and C. F. Barker, citizens of the state of Missouri.

5 Your orator, Union Pacific Railroad Company, alleges that it is a corporation organized and existing under and by virtue of the laws of the state of Utah and a citizen of the state of Utah; that the defendants, L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, E. A. Rhea, H. W. Rhea, Charles Bergman, ... Aldridge, John Burns, John B. Rees and Mrs. L. S. Bowers are citizens and residents of the state of Kansas, and that the defendants B. Friedburg and C. F. Barker are citizens and residents of the state of Missouri.

Your orator, Union Pacific Railroad Company, alleges that since April first, 1898, it has been engaged in operating a railroad extending from Kansas City, Missouri, through Wyandotte, Leavenworth and Douglas Counties, in the state of Kansas, and westward to Denver, Colorado and beyond; that it is the successor and owner of all the right, title and interest formerly possessed by The Union Pacific Railway Company in and to all that portion of the railway properties of said The Union Pacific Railroad Company located in the state of Kansas; that it became possessed of all the railroads, rights of way, privileges and franchises of The Union Pacific Railway Company situated in the state of Kansas, by virtue of foreclosure proceedings instituted against The Union Pacific Railway Company in the Circuit Court of the United States for the District of Kansas, and brought to a final termination therein; that said foreclosure proceedings were brought by the United States of America and others to foreclose certain liens upon the railroad, right of way, franchises and other property of said The Union Pacific Railway Company; that said The Union Pacific Railroad Company was a corporation created by the consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company, under and by virtue of an act of Congress entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July 1, 1862; that said Kansas Pacific Railway Company was the same cor-
6 poration as the one referred to in said act of July 1, 1862, as the Leavenworth, Pawnee & Western Railway Company; that the Leavenworth, Pawnee & Western Railway Company changed its corporate name to that of Union Pacific Railway Company, Eastern Division, and thereafter changed its corporate name to that of the Kansas Pacific Railway Company.

Your orator further alleges that the terms under which said railroad was to be constructed were afterwards supplemented and amended by the act of Congress of July 2, 1864, entitled, "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes,' approved July 1, 1862;" the resolution of May 7, 1866, entitled, "A resolution extending the time for the completion of the Union Pacific Railway Eastern Division," and the act of July 3, 1866 entitled "An act to amend an act entitled, ["An act to amend an act entitled,] 'An act to aid in the construction of

a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes,' approved July 1, 1862' " approved July 2, 1864.

Your orator alleges that said consolidated company, The Union Pacific Railway Company, became the owner of all the railroads and other properties of said constituent companies, under and by virtue of articles of consolidation duly entered into by them on the 24th day of January, 1880, and filed with the Secretary of the Interior in accordance with said acts of Congress.

Your orator alleges that there was granted to the said Leavenworth, Pawnee & Western Railway Company by the said act of Congress of July 1, 1862, as an entirety, a right of way through the public lands for the construction of its railroad and telegraph line, two hundred feet wide on each side of said railroad for such purposes, including all necessary ground for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables, and water stations, and that upon said first day of July, 1862, all the lands situated in what is known as the Delaware Diminished Indian Reservation were public lands belonging to the United States, subject to the terms of said act of Congress, and that there was granted under and by virtue of said act of Congress to said Leavenworth, Pawnee & Western Railway Company a right of way as an entirety two hundred feet in width upon each side of its railroad through said Delaware Diminished Indian Reservation; that said Delaware Diminished Indian Reservation extended from a north and south line located about forty rods west of the east line of sections number 21, 16, 9, and 4 in township 11, south, of range 24, east, Wyandotte county, Kansas, along the north side of the Kansas River, Westward through Wyandotte and Leavenworth counties to the boundary line between Leavenworth and Douglas counties; that from the eastern to the western boundary line of said Indian Reserve said railroad extends all the way within and through said Delaware Diminished Indian Reservation.

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Your orator further alleges that said railroad company complied with all the requirements of the acts of Congress with respect to the construction of said road, and did all that was necessary to give it title to said right of way, and that said right of way and railroad have been in continuous use and operation for about forty years last past.

Your orator further alleges that it is the owner and in possession of the right of way granted by Congress as aforesaid to the Leavenworth, Pawnee & Western Railway Company through

the Delaware Diminished Indian Reservation in Wyandotte and Leavenworth counties, Kansas, together with the franchises, privileges and appurtenances belonging thereto, and that it is in the daily operation of trains thereon.

Your orator alleges that its title to a right of way two hundred feet wide upon each side of its track through said Delaware Diminished Indian Reservation based upon said acts of Congress, has been adjudicated in various suits and that its title thereto has been definitely settled by the courts; that it was determined in the case of Grinter v. Union Pacific Ry. Co., reported in 23 Kansas, page 642; in the case of State v. Horn, reported in 34 Kansas, page 556 and in 35 Kansas, page 717; in the case of Union Pacific Ry. Co. v. Hugh Shannon, Trustee, et al., pending in the Circuit Court of the United States for the District of Kansas, wherein the decision was rendered by Brewer, Circuit Judge; in the case of Union Pa-
8 cific Ry. Co. v. Kindred, reported in 43 Kansas, page 134. Also in the case of Union Pacific R. R. Co. v. The Kansas City, Lawrence & Topeka Ry. Co., pending in the Court of Common Pleas of Wyandotte county, Kansas.

Your orator further shows to the court that in no case has a decision been rendered by the courts adverse to the claim of your orator to its four hundred foot right of way through said Indian Reservation.

Your orator further alleges that its business and the requirements of the public whom it serves demand the re-location of its tracks in various places within the right of way above mentioned; that in said re-location, curves are to be taken out, grades reduced, bridges built and a second main track added; that in making such changes and improvements it will be necessary for your orator to use the entire width of its right of way in many places.

Your orator further says that the contemplated improvements and changes involve the expenditure of vast sums of money and that they are necessary to enable it to properly discharge its obligations as a common carrier and to fulfill the duties required of it under and by virtue of the acts of Congress as aforesaid.

Your orator further alleges that it has begun the grading for said changes and improvements and that a large number of men and teams are now upon the ground to do the work, and that the defendants, L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Max-

well, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, ... Aldridge, John Burns, B. Friedburg, John B. Rees, Thomas Warren, C. F. Barker and Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Grooves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Ida Harvey, ... Harvey, ... Kanopp, C. M. Miller and ..... Proudy are interferring with the completion of said work; that they have united together to prevent your orator from continuing the work begun and that they have threatened the agents and employes of your orator with great bodily harm if they do any work on your orator's right of
9 way beyond a line fifty feet from the center of the track and parallel therewith, and threaten their arrest if they do so, and declare that they will cause their re-arrest and prosecution so long as they continue to work upon the aforesaid portion of your orator's right of way; that the defendants above named threaten to tear down the fences, remove the tracks and destroy the grade which your orator is placing upon its said right of way beyond said fifty foot line, and that they have federated together and are acting in concert for the purpose of preventing your orator from using the full width of its right of way for the purposes above mentioned. Your orator alleges that the destruction by defendants of any of the works of improvement which your orator intends placing on said right of way or any interference of your orator's use of its right of way, as threatened by said defendants will result in great and irreparable injury to it and to the public generally whom it serves as a common carrier; that it will prevent your orator from carrying out the duties imposed upon it by Congress and by its charter; that it will interfere with interstate commerce and the carriage of the United States mail.

Your orator shows to the court that the said defendants are the owners or occupants of lands adjoining the right of way of your orator within said Indian Reservation as aforesaid, but that they are without any right, of title or possession to any portion of your orator's right of way granted by Congress as aforesaid, and your orator alleges that it is entitled to the immediate use and benefit of the full width of its right of way for the uses and purposes aforesaid without interference from the said defendants.

Your orator further alleges that if the interference of said defendants with your orator's rights as aforesaid is permitted to go unchecked that it will result in opposition to the use of the full width of your orator's right of way by all the other adjoining land owners throughout the said Delaware Reserve, who number several hundred; that unless relief is granted to

your orator upon the equity side of the court it will compel it to bring a multiplicity of suits upon the law side thereof for the protection of its rights, or to defend a multiplicity of suits which may be brought by the said adjoining land
10 owners to prevent the use by your orator of that portion of its right of way located beyond a fifty foot line from its track as aforesaid.

Your orator further shows that if it is compelled to assert its rights upon the law side of the court that the time necessary to obtain full relief in the premises will be so great that it will imperil the making of the improvements contemplated by your orator, which its business as well as the exigencies of commerce and the rights of its patrons demand should be carried into immediate execution.

Your orator further shows that the matter in dispute herein exceeds, exclusive of interest and costs, the sum of two thousand dollars, and that this suit arises under the constitution and laws of the United States.

In consideration whereof, and inasmuch as your orator has no adequate or sufficient remedy at law for the wrong threatened to be done, and in order to avoid a multiplicity of suits, your orator, to the end that it may obtain the relief to which it is justly entitled in the premises, prays the court to grant to it a writ of Subpoena directed to L. P. Kindred, C. L. Kindred S. D. Knight Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDaniels, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Brown, Charles Bergman, E. A. Rhea, H. W. Rhea, ... Aldridge, John Burns, B. Friedburg, John B. Rees, C. F. Barker, Thomas Warren and Mrs L. S. Bowers, defendants hereinbefore named, requiring them and each of them to appear herein and answer to the several allegations in this bill contained, but not under oath, answer under oath being waived.

Your orator prays the court to grant a permanent injunction herein enjoining and restraining the said defendants and each and every of them, together with their servants, employes, agents, workmen and all persons under their authority, direction or control, from entering into or upon any of the above described right of way and property of your orator, being a strip of ground two hundred feet wide upon each side of its main track through said Delaware Diminished Indian Reservation, and from injuring or destroying any of the property of your orator or interfering with the use thereof or the use of said right of way by your orator, its servants, agents
11 or employes, and your orator prays that they may be temporarily enjoined from so doing until the final hearing of this cause.

And your orator prays for such other and further relief, preliminary and final, as in equity and good conscience it may be entitled to.

N. H. LOOMIS,
R. W. BLAIR and
H. A. SCANDRETT,
Solicitors for Complainant.

N. H. Loomis, of Counsel.

* * * * * * *

16 In the Circuit Court of the United States for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
vs.
L. P. Kindred, et al., Defendants.

Restraining Order.

Upon this day comes the above named complainant, by R. W. Blair, its solicitor, and presents to the court its verefied bill of complaint herein praying for a temporary injunction against the above named defendants; and the court upon considering said bill of complaint and being fully advised in the premises, sets down the hearing upon said application for a temporary injunction upon the 28th day of March, 1905, at 10 o'clock a. m., at Topeka, Kansas.

It is by the court further ordered that until the further order of the court the defendants and each and every of them, together with their servants, employes, agents and workmen and all persons under their authority, direction or control, be and they are hereby restrained from entering into or upon any of the right of way and property of the complainant, Union Pacific Railroad Company, being a strip of ground two hundred feet wide upon each side of its main track through the Delaware Diminished Indian Reservation, and from injuring or destroying any of the property of said Union Pacific Railroad Company or interfering with the use thereof or the use of said right of way by said Union Pacific Railroad
17 Company, its servants, agents or employes. The Delaware Diminished Indian Reservation referred to in this order extends from a north and south line located about forty rods west of the east line of section number twenty-one (21) in township eleven (11) south, of range twenty-four, East Wyandotte county, Kansas, westward upon both sides of said Union Pacific Railroad to the boundary line between Leavenworth and Douglas counties in the State of Kansas.

It is by the court further ordered that certified copies of

this restraining order be forthwith served on the defendants, and that the complainant give a bond in the sum of twenty thousand dollars, to protect the defendants and each of them against all damages which they may sustain by reason of the granting of this restraining order if it be finally determined that the same was improperly granted; said bond to be approved by the clerk of this court.

JOHN C. POLLOCK, Judge.

Done March 14th, 1905.

Endorsed: No. 8300. Union Pacific Rld. Co., Complainant, vs. L. P. Kindred, et al., Defts. Restraining Order. Filed Mch. 14, 1905. Geo. F. Sharitt, clerk.

* * * * * * *

28 In the Circuit Court of the United States
for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
vs.
L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, Aldridge, John Burns, B. Friedburg, John B. Rees, C. F. Barker, Thomas Warren, Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Grooves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Ida Harvey, Harvey, Kanopp, C. M. Miller, and Proudy, Defendants.

Now come the defendants, L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, B. Friedburg, John B. Rees, Thomas Warren, C. F. Barker, Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Groves, Ray Heidman, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Kanopp, C. M. Miller, Proudy, by G. C. Clemens, A. M. Harvey, and E. D. Osborn, their solicitors, and enter their appearance in this
29 suit to the complainant's bill of complaint and amendments thereto.

To the clerk of said court:

Enter the above in the Order Book in Equity of said court.

G. C. CLEMENS, A. M. HARVEY and E. D. OSBORN,
Solicitors for Defendants.

Endorsed: 8300. In the Circuit Court of the United States for the District of Kansas. Union Pacific Railroad Company, Complainant, vs. L. P. Kindred, et al., Defendants. Filed May 1st, 1905. Geo. F. Sharitt, clerk.

30 In the Circuit Court of the United States in and for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
No. .... vs. In Equity.
L. P. Kindred, et al., Defendants.

The joint and several demurrer of L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. J. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, B. Friedburg, John B. Rees, Thomas Warren, C. F. Barker, Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Groves, Ray Heidman, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, ... Kanopp, C. M. Miller, ... Proudy, defendants to the bill of complaint of Union Pacific Railroad Company, the above named complainant.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and
31 things in the said complainant's bill to be true, in such manner and form as the same are herein set forth and alleged, do demur thereto and for cause of demurrer show:

1. That the complainant has not in or by the said bill made or stated such a case as entitles it in a court of equity to the relief sought or prayed from or against these defendants, or to any part thereof.

2. That the said bill of the plaintiff is exhibited against these defendants and against the other defendants for several and distinct and independent matters and causes which have no relation to each other, and in which, or in, the great part of which, each of these defendants is in no way interested or concerned, and ought not to be implicated.

3. That the said complainant has not in and by its bill shown any good right or title to the land described in said bill,

in respect whereof the relief prayed in said bill ought to be granted against said defendants.

4. That the said complainant has not in and by its said bill sufficiently or adequately described said land in which it claims right or title and in respect to which it prays relief against these defendants.

5. That the said complainant has not in and by its bill stated or alleged with sufficient particularity the source from which and the manner in which it claims to derive and hold the right and title claimed therein.

6. That the complainant has not in and by its said bill stated or described with sufficient particularity and certainty the land upon which it claims that each or any of these defendants respectively are trespassing or are about to trespass or in respect to which it claims that each or any of these defendants respectively are or are about to interfere with the rights claimed therein by the complainant.

7. That the said bill is lacking in due certainty, and especially, as bill for an injunction, fails to make full and candid disclosures of the material facts, and especially in the following particulars, to-wit:

(a) What, if any, provisions were contained in the charter of the Leavenworth, Pawnee and Western Railroad Company and in the charters of the companies which are al-
32 leged to have succeeded to its rights, relative to their power to take and hold land and relative to the width of right of way which they might take and hold.

(b) When, in what manner, and by what authority the said Leavenworth, Pownee and Western Railroad Company, changed its corporate name to that of Union Pacific Railroad Company, Eastern Division, and thereafter to that of The Kansas Pacific Railway Company.

(c) How and by what authority the Union Pacific Railroad Company the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company were consolidated.

(d) How said complainant acquired title to the said lands and right of way claimed herein by virtue of said foreclosure proceedings mentioned in the bill, and what were the terms of the sale and of the deed, if any?

(e) What, if any, of the lands claimed by complainant as right of way in its bill were Indian lands or reservations, or lands held by Indian title at the time when said Act of Congress of July 1, 1862, went into effect, and what, if any, of such

lands, had been allotted in severalty to the Indians, under the treaty of 1860 with the Delaware Indians?

(f) When and in what manner, if at all, the Leavenworth, Pawnee and Western Railroad Company or any of its successors extend into and took possession of the right of way which it was authorized to acquire through the Delaware Diminished Reservation by the treaty of 1860 with the Delaware Indians, and what width of right of way was so taken.

(g) What are the sources of the titles of the several defendants whether derived from Delaware Indians who became citizens of the United States and obtained patents under the treaty of 1866; or from the Leavenworth, Pawnee and Western Railroad Company, its successors or grantees; or from the Missouri River Railroad Company, its successors or grantees, or others deriving title under the treaty of 1866 with Delaware Indians; and, generally what is the source of titles of each of said defendants so that the bill may disclose whether any, and which of said defendants hold title subject to the alleged rights of the complainant.

(h) In what respects and particulars the said defendants, and each of them, are trespassing upon the lands claimed by complainant or otherwise interfering with the rights
33 of complainant as alleged in the bill, and upon what claims of right they are doing so, and in what respects, if at all, they are actually confederating and conspiring together to invade or interfere with the rights of the complainant as claimed in the bill.

Wherefore, and for divers other errors and imperfections, these defendants respectively humbly demand the judgment of this honorable court, whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

G. C. CLEMENS,
A. M. HARVEY,
EDWARD D. OSBORN,
Solicitors for said defendants.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

G. C. CLEMENS,
A. M. HARVEY,
EDWARD D. OSBORN,
Solicitors for Defendants.

State of Kansas,
County of Johnson—ss.

L. P. Kindred and Jesse Haney, being first duly sworn according to law each deposes and says, that he is one of the defendants above mentioned and that the foregoing demurrer is not interposed for delay.

L. P. KINDRED,
JESSE HANEY.

Sworn to and subscribed before me this 19, day of May, 1905.
[Seal] L. C. DOW,
Notary Public.

Com. expires 5/14/09.

Endorsed: 8300. In the Circuit Court of the United States. Union Pacific Railroad Company, Complainant, vs. L. P. Kindred, et al., Defendants. Demurrer. Filed May 23, 1905. Geo. F. Sharitt, Clerk.

34 In the Circuit Court of the United States for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
vs.
L. P. Kindred, et al., Defendants.

Journal Entry.

This cause coming on to be heard upon this 31st day of October, 1905, upon the demurrer of the defendants, L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. F. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, B. Friedberg, John B. Rees, Thomas Warren, C. F. Barker, Mrs. L. S. Bowers, P. H Kughns, Charles Sandberg, Edwin Taylor, J. G. Groves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, ...Knopp, C. M. Miller, Ida Harvey and E. Proudy filed herein to the amended bill of complaint, upon due consideration said demurrer is over ruled and it is ordered that the aforesaid defendants
35 answer or plead to the amended bill of complaint herein, on or before the next rule day.

JOHN C. POLLOCK, Judge.

Endorsed: In the Circuit Court of the United States, in and for the District of Kansas, First Division. No. 8300. Union Pacific Railroad Co., Complainant, vs. L. P. Kindred et al.,

Defendants. Journal Entry. Filed Oct. 31, 1905. Geo. F. Sharitt, clerk.

36 In the Circuit Court of the United States in and for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
vs.
L. P. Kindred, et al., Defendants.

The joint and several plea of L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDaniels, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, B. Friedburg, John B. Rees, Thomas Warren, C. F. Barker, Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Grooves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Herman Knopp, C. M. Miller, Ida Harvey and E. Proudy, defendants to the amended bill of complaint of Union Pacific Railroad Company, complainant.

These defendants respectively by protestation not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true in such manner and
37 form of the same are thereby and therein set forth and alleged, for plea to so much and such part of said amended bill, as prays an injunction or an adjudication of title as to that part of the alleged right of way claimed in said complainant's bill lying and situate beyond the distance of fifty feet on either side from the center of the main track of the railroad of the complainants and parallel therewith as stated in said bill, severally state that it is not true that said complainant when it filed its bill herein was, or that either of its predecessors in right, title or interest, had ever theretofore been, in possession of any part of the alleged right of way claimed herein beyond the said distance of fifty feet on either side from the center of its main track and parallel therewith, as stated in said bill but, that, on the contrary these defendants respectively and their predecessors in title and claim had been continually for many years, and were until a few days before the filing of said bill, when their possession was unlawfully disturbed as hereinafter alleged, in the peaceable, open exclusive and actual possession of, and had during all of said time peaceably and uninterruptedly cultivated, used and openly exerted dominion as owners over, all of said lands outside said limit of fifty feet from the middle of said main track and parallel therewith and that at no time during said period had the complainant or its predecessors in title as aforesaid, ever

asserted any claim whatever to or in said land; that said complainant, a few days before filing its bill herein came with a large force of men and unlawfully and forcibly entered upon the said lands in controversy herein, whereof, said complainant pretends in its bill to be in possession, lying beyond said limit of fifty feet, and sought by force and violence and without any process of law or pretense thereof, to expel these defendants from their aforesaid respective lands, and took forcible possession thereof, whereupon these defendants rightfully and properly sought to resist said violent intrusion and to defend and retain possession of their respective lands unless and until deprived thereof by due process of law; and that thereupon said complainant, falsely representing by its bill that said complainant, was in lawful possession of the said premises and that these defendants were seeking violently to trespass thereon, secured a restraining order to be issued herein upon said bill, the sole purpose and effect of which was to
38 compel these defendants to remain quiescent while said complainant forcibly and without process of law should seize their hands and deprive them of the possession thereof. And these defendants are advised that a court of equity will not protect by its process or decree the possession of lands so acquired by force and violence and for the purpose of giving a complainant a standing in court as a plaintiff in possession, and that such a court will not under such circumstances permit a party guilty of such unlawful conduct to set up its alleged title to said lands, but will refuse to hear such party until it shall put itself and the respective defendants, and the lands in controversy, in the same condition and situation which existed before the commission of said wrongful acts of the complainant and restore the status then existing and until said complainant shall come into court with clean hands. All of which matters and things these defendants severally do aver to be true and they plead the said matters to so much of said amended bill as is hereinbefore particularly mentioned and pray the judgment of this Honorable court whether they should be compelled to make any other or further answer to so much of said bill as it hereinbefore pleaded to, and pray to be hence dismissed with their costs and charges in that behalf most wrongfully sustained.

As for plea to so much and such part of said amended bill as prays an injunction as to the remaining portion of said alleged right of way, to-wit, such part thereof as lies between and inside of two lines or limits situate respectively fifty feet upon either side of the center of the main track of complainant's railroad and running parallel therewith, these defendants respectively state that they have not, or have any or either

of them trespassed or encroached upon said land, or have they in any way interfered with the full and complete possession, occupation, use, control or operation of said land or of complainant's railway thereon by the complainant or its officers, agents and servants, nor do they or any of them intend nor have they confederated or conspired together to do any of these things. All of which matters and things these defendants severally do aver to be true and they plead the said matters to so much of said amended bill as is hereinbefore particularly mentioned and pray the judgment of this Honorable Court whether they should be compelled to make any
39 other or further answer to so much of said bill as is hereinbefore pleaded to, and pray to be hence dismissed with their costs and charges in that behalf most wrongfully sustained.

G. C. CLEMENS,
A. M. HARVEY,
EDWARD D. OSBORN,
Counsel for Defendants.

We hereby certify that in our opinion the foregoing plea is well founded in point of law.

G. C. CLEMENS,
A. M. HARVEY,
EDWARD D. OSBORN,
Counsel for Defendants.

State of Kansas,
County of Johnson—ss.

L. P. Kindred first being duly sworn according to law deposes and says:

That he is one of the above named defendants;

That the foregoing plea is not interposed for delay and that the same is true in point of fact.

L. P. KINDRED.

Sworn to and subscribed before me this 30" day of Oct. 1905.

[Seal]

L. C. DOW,
Notary Public.

Com. Expires 5/14 09.

Endorsed: No. 8300. In the Circuit Court of the United States in and for the District of Kansas, First Division. Union Pacific Railroad Company, Complainant, vs. L. P. Kindred et al., Defendants. Plea. Filed Oct. 31, 1905. Geo. F. Sharitt, clerk.

41 * * * * * *

In the Circuit Court of the United States in and for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
No. .... vs In Equity.
L. P. Kindred, et al., Defendants.

Order.

The plea of the defendants, L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, B. Friedburg, John B. Rees, Thomas Warren, C. F. Barker, Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Groves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Herman Knopp, C. M. Miller, Ida Harvey, and E. Proudy, to the amended bill of complaint in this cause, having heretofore come on to be argued and the solicitors for the respective parties having been heard thereupon and the court being fully advised in the premises,

42 It Is Ordered, That the said plea do stand for an answer with liberty to the complainant to except thereto, and saving to the said defendants the benefit of their said plea at the hearing, and it is further ordered that the said defendants make such further answer to the amended bill of complaint herein as they may be advised, within five days from this date.

JOHN C. POLLOCK, Judge.

Endorsed: 8300. In the Circuit Court of the United States in and for the District of Kansas, First Division. Union Pacific Railroad Company, Complainant, vs. L. P. Kindred, et, al., Defendants. In Equity, No. Order. Filed Nov. 28, 1905. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States in and for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
vs.
43 L. P. Kindred, et al., Defendants.

Answer.

The joint and several answers of L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H.

Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, B. Friedburg, John B. Rees, Thomas Warren, C. F. Barker, Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Grooves, Ray Heidman, E. B Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Kanopp, C. M. Miller, and Proudy, defendants to the amended bill of complaint to the Union Pacific Railroad Company.

These defendants, respectively, now and at all times
44 hereafter, saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for further answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, in accordance with the order of this court heretofore made, directing that their plea stand for an answer and that they make such additional answer as they might be advised, severally and each for himself and by way of answer additional to the matter of said plea, say, that they admit that they are respectively citizens and residents of the State of Kansas and that the complainant is a corporation organized and existing under and by virtue of the laws of the State of Utah and that it is a citizen and resident of the State of Utah.

These defendants respectively further say that the Leavenforth, Pawnee & Western Railroad Company was a corporation duly organized and existing under and by virtue of a special act of the Legislature of the Territory of Kansas enacted at the session of 1855, entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company", that said corporation is the corporation that is referred to by the same name in the acts of Congress of July 1, 1862, and July 2, 1864, as is hereinafter stated, and that the said corporation was authorized and empowered by the aforesaid act of incorporation to hold as a right of way a strip of land not exceeding one hundred feet in width.

That the name of the Leavenworth, Pawnee & Western Railroad Company was subsequently changed to that of The Union Pacific Railway Company, Eastern Division, and that this name was afterward changed to that of The Kansas Pacific Railway Company; that afterward on or about the 24th day of January, 1880, the said The Kansas Pacific Railway Company was under authority of law, consolidated with the Union Pacific Railroad Company and the Denver Pacific Railway

Company, and that there was thereby created a new corporation The Union Pacific Railway Company, which succeeded to all the rights and privileges of the aforesaid corporations.

That subsequently a decree was rendered by the Cir-
45 cuit Court of the United States for the District of Kansas foreclosing a mortgage upon the franchises and property of the said The Union Pacific Railway Company and ordering a sale thereof; that the complainant purchased said franchises and property at said foreclosure sale and thereby became entitled to the property, rights and privileges held and owned by the said Leavenworth, Pawnee & Western Railroad Company, and its successors as aforesaid.

As to the trespasses and wrongful acts and the encroachment upon and interference with the complainant and its officers and agents alleged in said bill of complaint to have been committed or threatened by the defendants, the defendants, severally answering and each for himself, deny that they have, or any or either of them, encroached or trespassed upon so much of said land herein claimed by the complainant, as is included in a strip of land one hundred feet wide along said line of railway of the complainant, that is to say, extending fifty feet upon either side of the center of said line of railway, or have in any way interfered with the full and complete possession, occupation, use, control or operation of said strip of land or of complainant's railway thereon by the complainant or its officers, agents and servants, or that they or any of them intend or have confederated or conspired together to do any of these things.

And as to the remainder of the land claimed by the complainant herein as right of way or otherwise, these defendants severally deny that the complainant or its predecessors in title, as hereinbefore described, have or ever had any right of way or any other right, title, interest or claim over, through, in or to any of said lands. And these defendants severally deny that they or any of them have encroached or trespassed upon any of the lands of the complainant or have in any way interferred with the full and complete possession, occupation, use, control or operation, by the complainant of its property or of its railway, or that they have intended or conspired together to do any of these things, but these defendants respectively say that they have done no more than lawfully use, occupy and defend their respective lands and property as hereinafter described.

46 These defendants respectively further say that on or about the 24th day of September, 1829, the United States by treaty with the Delaware Nation set apart for and conceded and guaranteed to the said Delaware Nation a large tract of land between the Kansas and Missouri Rivers, and in-

cluding all the land claimed herein by the complainant, as a permanent residence for said Delaware Nation; that on or about the 6th day of May, 1854, the said Delaware Nation by treaty ceded to the United States all of said land so set apart for them by the aforesaid treaty of 1829, except a certain portion thereof which had been granted to the Wyandotte tribe of Indians and a certain other portion which was reserved and guaranteed to said Delaware Nation for their permanent home, and said last tract included all the land herein claimed by the complainant.

That on or about May 30th, 1860, a treaty was duly made between the United States and the said Delaware Nation whereby it was provided that eighty acres out of the lands reserved and guaranteed to said Delaware Nation by the aforesaid treaty of 1854 should be granted and guaranteed to each member of said nation and his heirs in severalty for their exclusive and permanent use; that by the said treaty certain privileges of preemption and of preference in the purchase of the excess lands then or theretofore ceded to the United States by said Indians for the benefit of said Delaware Nation were provided for and offered to the said Leavenworth, Pawnee & Western Railroad Company, and said Company, subsequently and on or before the 2nd day of July, 1861, accepted the said benefits provided in said treaty.

That subsequently, and before the 1st day of July, 1862, to-wit: during the years 1860 and 1861, A. D., under and in accordance with the provisions of said treaty of 1860 the said allotments of eighty acres each out of said lands were made in severalty to each member of the Delaware Nation and his heirs for their exclusive and permanent use and that said allotments included all the lands claimed herein by the complainant.

That on the 1st day of July, 1862, an act of Congress was enacted, which among other things, incorporated the Union Pacific Railroad Company and granted to said corporation a right of way through the public lands, said right of way to extend two hundred feet upon either side of the line
47 of railway of said corporation where it passed over the public lands, but said line of railway did not pass and was not intended to pass through the lands reserved to the Delaware Indians by treaty as aforesaid, nor through the lands allotted in severalty to the members thereof as aforesaid, and said act did not grant to the said corporation any right of way over or through said lands, or over or through any of the lands claimed herein by the complainant. That the aforesaid Act of Congress of July 1, 1862, also authorized the Leavenworth, Pawnee & Western Railroad Company, another corpora-

tion, being the corporation hereinbefore referred to by that name, to build a line of railroad westward from the Missouri river at the junction of the Kansas river on the South side thereof, "upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid," but said act of Congress contained no grant of right of way to the said Leavenworth, Pawnee & Western Railroad Company, unless such a grant be implied in the words above quoted. That the lands herein claimed by the complainant were not public lands when said Act of Congress of July 1, 1862, was enacted or when it took effect, nor were any of them, but that they had been expressly granted, reserved and guaranteed to the use of the Delaware Indians by treaty, and were part of an Indian reservation, and had been allotted in severalty in individual Indians for the permanent and exclusive use and occupation of them and their heirs, and that said Act of Congress did not grant any right of way over said lands nor any other right, interest, estate or claim therein or thereto. That there were other lands through which the said Union Pacific Railroad Company and the said Leavenworth, Pawnee & Western Railroad Company was authorized to pass and probably would pass which were public lands and over which said Act of Congress did grant a right of way, and that the said Act did not contemplate or require nor was it necessary that the line of railway of the Leavenworth, Pawnee & Western Railroad Company should be built over or through the aforesaid lands reserved, guaranteed and allotted to the Delaware Indians as aforesaid.

48 That on or about July 2, 1864, an Act of Congress was enacted granting certain further rights, privileges and property to the Leavenworth, Pawnee & Western Railroad Company and other corporations, and that in said Act it was provided that neither the grants therein contained nor those contained in the Act of Congress of July 1, 1862, should extend to government reservations. The Leavenworth, Pawnee & Western Railroad Company, and its successors, predecessors in title of the complainant as is hereinbefore set forth, received and accepted the benefits of the aforesaid Act of Congress of July 2, 1864, and thereby were precluded from claiming, obtaining or holding any right of way or other right, estate, interest or title by virtue of or under said Act of Congress of July 1, 1862, or said Act of Congress of July 2, 1864, over, through or in the lands herein claimed by the complainant or over through or in any lands within any Indian reservation.

These defendants respectively deny that the complainant has now or ever did have any right or title to a right of way two

hundred feet wide on each side of its line of railway, and they and each of them deny that the Leavenworth, Pawnee & Western Railroad Company, or its successors, predecessors in title of the complainant, at any time obtained or had any such right or title.

And these defendants severally say that neither the complainant, nor the said the Leavenworth, Pawnee & Western Railroad Company, nor its successors predecessors in title of the complainant, ever took possession of or occupied out of said lands herein claimed by these defendants or any of them, more than a strip one hundred feet wide for its right of way, that is to say, fifty feet in width on either side of the center of said line of railway; and these defendants severally say that the complainant and its predecessors have continuously maintained a fence adjoining all said lands at a distance of fifty feet from the center of said line of railway on either side, that all the lands beyond said limit of fifty feet and beyond said fence have been continuously in the uninterrupted possession, occupation and use of these defendants and others claiming title thereto,
49 who have expended large sums of money in the protection and improvement of said lands and in many cases have erected buildings thereon within two hundred feet of the center of said line of railway, with the knowledge and acquiescence of the complainant, and its predecessors in title; that the complainant and its predecessors in title have repeatedly represented their said right of way to be only one hundred feet wide as aforesaid upon their maps and plans furnished and displayed to these defendants and other adjoining owners, and have on several occasions when desiring to use more than said width of one hundred feet purchased, leased or contracted for the requisite land beyond said limits from such persons as owned or claimed the adjoining land.

And these defendants further say that they and their rightful predecessors in title and claim, as hereinafter described, have respectively for more than thirty years possessed, occupied and used the said lands hereinafter described, with the sole exception of the aforesaid strip of land one hundred feet wide along said line of railway, and that said possession and occupation of these defendants and their predecessors respectively has been actual, open notorious, continuous, uninterrupted and adverse and hostile to the complainant and its predecessors, and to all other persons, during the whole of said period, and under claim of title thereto.

And these defendants, further answering severally, say that they are respectively the owners of and have full, complete and lawful right, title and interest in and to the respective tracts of land hereinafter described beyond said line fifty feet

from the center of said line of railway except where in said descriptions it may be alleged that any of these defendants is merely tenant or lessee thereof, and in such cases the said defendants severally says that they have good, complete, and lawful title as such lessees or tenants.

These defendants, respectively, say that subsequent to said Act of Congress of July 1, 1862, these defendants became and are now the rightful owners, respectively, except as aforesaid, of the following described lands, by valid and legal mesne, conveyances and transfers made through or with the express consent of the United States, under and by virtue of a certain treaty made July 4th, 1866, from the members of the Delaware Nation to whom said lands had been respectively allotted in severalty, as aforesaid, and that by virtue of said mesne conveyances these defendants became entitled and succeeded to the full right and title to and in said following described tracts of land which was vested in the United States and in the said allottees by virtue of the aforesaid allotment, and that they are now the rightful owners thereof; that at the times when said several conveyances and transfers were made from the said members of the Delaware Nation, through or by the consent of the United States, the full and complete title to said lands so conveyed was vested in the several Indians whose lands were so conveyed and in the United States, free from any valid claims, right, title or interest in the complainant, or its predecessors in title, or any other persons or persons whatsoever, and that the full, complete and unincumbered right, title and interest in and to said lands passed by virtue of said conveyances and transfers and has become vested in these defendants respectively through good and valid mesne conveyances and transfers as aforesaid,

And these defendants, severally answering say that Kanopp is the owner of and has full, complete and lawful right, title and interest in and to the following land: The east ninety (90) acres of the southwest quarter (¼) less three and forty-five hundredths (3 45/100) acres in section twenty-two (22) township twelve (12) range twenty (20); that John B. Rees is the owner of and has full, complete and lawful right, title and interest in and to the following land; the southeast one-half (½) of the southwest quarter (¼) in section twenty-five (25) township twelve (12) range twenty (20) that C. P. Bauer is the owner of and has full, complete and lawful right, title and interest in and to the following land; the west one half (½) of the northwest quarter (¼) and the west one-half (½) of the southwest quarter (¼) all in section thirty (30) township twelve (12) range twenty-one (21); that Paul Lukam is the owner of and has full, complete and lawful right, title and interest in and

to the following land: the west one half (½) of the southeast quarter (¼); and lots one (1) to fifteen (15) in block seven (7) and lots one (1) to thirteen (13) in block eight (8) in the city of Fall Leaf, Kansas, all in section twenty-nine (29) township twelve (12) range twenty-one (21); that George Vail is
51 the owner of and has full, complete and lawful right, title and interest in and to the following land; the southeast quarter (¼) of the southwest quarter (¼) in section twenty-nine (29) township twelve (12) range twenty-one (21) and lots fourteen (14) and fifteen (15) in block eight (8) block number one (1) lots one (1) two (2) three (3) and four (4) in block two (2) in the town of Fall Leaf, in section twenty-nine (29) township twelve (12) range twenty-one (21); that John Zeigler is the owner of and has full, complete and lawful right, title and interest in and to the following land; eighty (80) acres of the southeast quarter (¼) of section twenty-nine (29) township twelve (12) range twenty-one (21); that C. P. Bauer is the owner of and has full, complete and lawful right, title and interest in and to the following land: The southeast quarter (¼) of the northwest quarter (¼) of section twenty-eight (28) township twelve (12) range twenty one (21); that Martin Kapp is the owner of and has full, complete and lawful right, title and interest in and to the following land: The west one-half (½) of the northeast quarter (¼); the southeast quarter (¼) of the northeast quarter (¼) all in section twenty-three (23) township twelve (12) range twenty-one (21); that A. A. Bowen is the owner of and has full, complete and lawful right, title and interest in and to the following land: The northeast quarter (¼) of the northeast quarter (¼) of section twenty-three (23) township twelve (12) range twenty-one (21); that Proudy is the owner of and has full, complete and lawful right, title and interest in and to the following land: The southeast quarter (¼) of the northeast quarter (¼) of section twenty-three (23), township twelve (12) range twenty-one (21); that H. W. Rhea is the owner of and has full, complete and lawful right, title and interest in and to the following land: South half (½) of the east half (½) of northeast quarter (¼) of section thirteen (13) township twelve (12) range twenty-two (22) and the west half (½) of the northwest quarter (¼) of section eighteen (18) township eleven (11) range twenty-three (23) p; that H.W.Rhea, Jr., is the owner of and has full, complete and lawful right, title and interest in and to the following land: The northeast quarter (¼) of the northeast quarter (¼) forty (40) acres; the
52 west half (½) of the northeast quarter (¼) ten (10) acres; lots numbers two (2) and three (3) in the southwest fractional quarter (¼) all in section thirteen (13) township twelve (12) range twenty-two (22); that E. A. Rhea is the owner of and has full, complete and lawful right, title

and interest in and to the following land; the west one-half (1/2) of the northeast quarter (1/4); and the west half (1/2) of the northwest quarter (1/4) of the southeast quarter (1/4) all in section thirteen (13) township twelve (12) range twenty-two (22); that C. M. Miller is the owner of and has full, complete and lawful right, title and interest in and to the following land: The northeast quarter (1/4) of the northeast quarter (1/4) of section thirteen (13) township twelve (12) range twenty-two (22) and lot number three (3) in section twenty-nine (29) township eleven (11) range twenty-four (24); that J. B. Waters is the owner of and has full, complete and lawful right, title and interest in and to the following land: The south half (1/2) of the west half (1/2) of the northeast quarter in section twenty-one (21) township twelve (12) range twenty-two; that J. S. McDaniels is the owner of and has full, complete and lawful right, title and interest in and to the following land: The east half (1/2) of the northwest quarter (1/4) and lot five (5) being the northwest quarter of the northwest quarter (1/4), all in section twenty-one (21) township twelve (12) range twenty-two; and the west fractional half (1/2) of the northwest fractional quarter (1/4) of section five (5) township eleven (11) range twenty-three (23) forty-eight and thirty-one hundredth (48 30/100) acres more or less; and the southeast fractional quarter (1/4) of section six (6) township twelve (12) range twenty-three (23) one hundred and forty-nine and eighty-three one hundredth (149 83/100) acres more or less; that C. L. Kindred is the owner of and has full, complete and lawful right, title and interest in and to the following land: All of the land north of the Union Pacific Railroad of the west half (1/2) of the northeast quarter (1/4) of the fractional section twenty-one (21) township twelve (12) range twenty-two (22); also thirty-eight acres of the southeast quarter (1/4) of the northeast quarter (1/4) of section twenty-one (21) township twelve (12) range twenty-two; that S. D. Knight is the owner of and has full, complete and lawful right, title and interest in and to the
53 following land: The East one-half (1/2) of the Northwest quarter (1/4) containing forty-seven (47) acres in Section twenty-two (22) township twelve (12) range twenty-two (22); that L. P. Kindred is the owner of and has full, complete and lawful right, title and interest in and to the following land: Part of the east one-half (1/2) of the Northwest quarter (1/4) containing thirty-three (33) acres; and the west one-half (1/2) of the Northwest quarter (1/4) and the East one-half (1/2) of the Northwest quarter (1/4), all in section twenty-two (22) townhsip twelve (12) range twenty-two (22); that Charles Taylor is the owner of and has full, complete and lawful right, title and interest in and to the following land:

The North forty-five (45) acres of the East one-half (1/2) of the Northeast quarter (1/4) in section twenty-two (22) township twelve (12) South of range twenty-two (22); that Jerry H. Murphy is the owner of and has full, complete and lawful right, title, and interest in and to the following land: The Northwest quarter (1/4) of section twenty-three (23) township twelve (12) range twenty-two (22); and the southeast quarter (1/4) of section thirty-one (31) township eleven (11) range twenty-three (23); and lot four (4) in section thirty-two (32) township eleven (11) range twenty-three (23); and the southwest quarter (1/4) of section twenty-seven, township eleven (11) range twenty-three (23); that A. M. Maxwell is the owner of and has full, complete and lawful right, title and interest in and to the following land; Twelve and sixty-seven one-hundredth (12 67/100) acres out of the Northwest corner of section seven (7) township eleven (11) range twenty-three (23); that James Trant is the owner of and has full, complete and lawfal right, title and interest in and to the following land: Part of the Southeast quarter (1/4); part of the southwest quarter (1/4) all in section twenty-eight (28) township eleven (11) range twenty-three (23); and the Northwest corner of the East one-half of the Southeast quarter of section twenty-seven (27) township eleven (11) range twenty-three (23); that J. C. Grooves is the owner of and has full, complete and lawful right, title and interest in and to the following land; commencing at the intersection of the Union Pacific Railroad with the line between sections twenty-five (25) and twenty-
54 six (26) North to County road, west to line of town of Edwardsville, South to Union Pacific one hundred (100) foot right of way, East to beginning containing twenty-six (26) acres; in Section twenty-six (26) township eleven (11) range twenty-three (23); and the East one-half (1/2) of the East one-half (1/2) of the Southwest quarter (1/4) containing twenty (20) acres in section twenty-five (25) township eleven (11) range twenty-three (23); that Edwin Taylor is the owner of and has full, complete and lawful right, title and interest in and to the following land: Part of the southeast quarter (1/4) of section twenty-six (26) township eleven (11) range twenty-three (23); the west one-half (1/2) of the East one-half (1/2) of southwest quarter (1/4) containing twelve (12) acres, in section twenty-five (25) township eleven (11) range twenty-three (23); that H. E. Thompson is the owner of and has full, complete and lawful right, title and interest in and to the following land; The Southeast quarter (1/4) of section twenty-five (25) township eleven (11) range twenty-three (23); that C. Bergman is the owner of and has full, complete and lawful right, title and interest in and to the following land: The Southeast quarter (1/4) of section twenty-nine (29) township eleven (11)

range twenty-three (23); and the Southwest quarter (1/4) of section twenty-eight (28) township eleven (11) range twenty-three (23); that J. P. Barker is the owner of and has full, complete and lawful right, title and interest in and to the following land: The East one-half (1/2) of the southeast quarter (1/4) of section thirty (30) township eleven (11) range twenty-four (24) that B. Friedburg is the owner of and has full, complete and lawful right, title and interest in and to the following land: Lots five (5) and six (6) and the North fractional one half, 1/2); the southeast one-quarter (1/4)p; all in section twenty-one (21) township eleven (11) range twenty-four (24); that Jesse Haney is the owner of and has full, complete and lawful right, title and interest in and to the following land: Blocks seventeen (17) eighteen (18) nineteen (19) twenty (20) and twenty-one (21) in the city of Lenape, Leavenworth county, Kansas; That Thomas Warren is the owner of and has full, complete and lawful right, title and interest in and to the following land: Lots nine (9) and ten (10) in block
55 thirty-six (36); lots three (3) four (4) five (5) six (6) seven (7) and eight (8) in block twenty-eight (28) all in the city of Linwood, Leavenworth county, Kansas; that Ray Heidman has good and lawful right, title and interest as tenant and lessee, under and by virtue of a lease from the true and rightful owner of the land heretofore described as belonging to H. E. Thompson; that Joseph Haney has good and lawful right, title and interest as tenant and lessee, under and by virtue of a lease from the true and rightful owner of the land heretofore described as belonging to Jerry H. Murphy; that John Fore has good and lawful right, title and interest as tenant and lessee, under and by virtue of a lease from the true and rightful owner of the land heretofore described as belonging to H. W. Rhea, Jr., that Charles Sandberg has good and lawful right, title and interest as tenant and lessee, under and by virtue of a lease from the true and rightful owner of the land heretofore described as belonging to B. Friedburg; that P. H. Kughns has good and lawful right, title and interest as tenant and lessee, under and by virtue of a lease from the true and rightful owner, of the following land: The southeast and the southwest quarters (1/4) of section twenty-seven (27) township eleven (11) range twenty-three (23) all of the above described lands are situated in the counties of Leavenworth and Wyandotte, Kansas.

These defendants severally further say that it is not true that the title of the complainant to a right of way two hundred feet wide upon each side of its track through the said Delaware Diminished Reserve has been adjudicated in any suits or that its title thereto has been definitely settled by the courts, but these defendants severally state that none of the cases referred

to in the complainant's bill adjudicated, determined, or settled the rights or claims of these defendants or of any of them, or in any way established the claim of complainant herein made, or in any way adjudicated, determined or settled the conflicting claims of these several defendants and the complainant.

And these defendants respectively deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this, that any other matter, cause or thing in the plaintiff's bill of complaint con-
56 tained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants, respectively, are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

L. P. KINDRED,
C. L. KINDRED,
D. S. KNIGHT,
JESSE HANEY,
CHARLES TAYLOR,
JERRY H. MURPHY,
J. D. WATERS,
J. S. McDANIELD,
JOHN ZEIGLER,
JOHN B. REES,
C. P. BAUER,
PAUL LUKAM,
GEORGE VAIL,
J. W. SMITH,
JAMES TRANT,
R. M. MAXWELL,
A. A. BOWEN,
CHARLES BERGMAN,
E. A. RHEA,
H. W. RHEA,
B. FRIEDBURG,
THOMAS WARREN,
C. F. BARKER,
MRS. L. S. BOWERS,
P. H. KUGHNS,
CHARLES SANDBERG,
EDWIN TAYLOR,
J. G. GROOVES,
RAY HEIDMAN,

E. B. SILVER,
H. E. THOMPSON,
JOSEPH HANEY,
H. W. RHEA, JR.,
J. M. HOOPER,
JOHN FORE,
MARTIN KAPP,
..... KANOPP,
C. M. MILLER,
..... PROUDY,

By their solicitors,
Edward D. Osborn;
A. M. Harvey,

G. C. CLEMENS,
A. M. HARVEY,
EDWARD D. OSBORN,
Solicitors for Defendants.

Endorsed: #8300. In the Circuit Court of the United States in and for the District of Kansas, First Division. Union Pacific Railroad Company, Complainant vs. L. P. Kindred et al. Defendants. Answer. Filed Dec. 4, 1905. Geo. F. Sharitt, Clerk.

57 In the Circuit Court of the United States for the District of Kansas First Division.

Union Pacific Railroad Company, Complainant.
vs,
L. P. Kindred, et al., Defendants.

The replication of the above named plaintiff to the answer of the above named defendant.

This replicant, saying and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereunto, sayeth that it does and will aver maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and
58 sufficiently replied unto, confessed or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this hon-

orable court shall direct, and humbly as in and by its said bill it has already prayed.

N. H. LOOMIS,
R. W. BLAIR,
H. A. SCANDRETT,
Solicitors for complainant.

Endorsed: No. 8300. Union Pacific Rld. Co. Complt. vs. L. P. Kindred et al., Defts. Replication. Filed Jany. 2, 1906. Geo. F. Sharitt, clerk.

* * * * * * * * *

60 In the Circuit Court of the United States for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
vs.
L. P. Kindred, et al., Defendants.

Agreed Statement of Facts.

To avoid voluminous proofs of undisputed facts, it is hereby stipulated that on the hearing of this cause, the following propositions shall be taken as true with the same effect, and no other, as if they had been conclusively established by testimony regularly taken in the cause. That is to say, said propositions are admitted, but neither the making of this stipulation nor anything contained in it shall be deemed an admission that any of said propositions are material, nor shall the making of this stipulation nor anything contained in it be deemed nor construed a waiver of any plea, pleading, question, matter or thing in this cause, but on the hearing the parties shall have the same right to object to any of said facts as if they had been proved by depositions offered to be read at the hearing.

1. The complainant, Union Pacific Railroad Company, is a railroad corporation, organized and existing under and by virtue of the laws of the State of Utah, and was at the time of the bringing of this suit and still is a citizen and resident of that State.

2. The defendants were, at the date of bringing this suit, and still are, citizens and residents of the State of Kansas.

3. The amount in controversy in this suit, exclusive of interest and costs, exceeds the sum of two thousand dollars ($2,000.)

4. The Leavenworth, Pawnee & Western Railroad Company was a corporation created and existing under an act of the Legislature of the Territory of Kansas, enacted at the session of 1855. The act of incorporation is published in the Territorial

Statutes of 1855, at page 914, and is hereby referred to and made a part hereof. The said Leavenworth, Pawnee & Western Railroad Company built a line of railway from Leavenworth to Lawrence, intending to extend it westward to form a line from Leavenworth to Fort Riley, as provided in the said incorporating act. After December 23, 1862, as hereinafter stated, the said corporation built a line of railway and telegraph from Kansas City to Lawrence, which said line alone ran through or abutted upon any of the lands in controversy in this suit.

5. The Leavenworth, Pawnee & Western Railroad Company changed its corporate name to that of the Union Pacific Railroad Company, Eastern Division, and thereafter changed its name to that of the Kansas Pacific Railway Company; the said corporations being the same ones named in the acts of Congress herein referred to.

6. Afterwards, on or about the 24th day of January, 1880, the said Kansas Pacific Railway Company was, under authority of law, duly consolidated with two other corporations, to-wit, the Union Pacific Railroad Company, a corporation created and existing under an act of Congress entitled, "An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1, 1862, as hereinafter mentioned in the 13th paragraph of this agreed statement; and the Denver Pacific Railway & Telegraph Company, a corporation
61 created by virtue of the laws of Colorado; and by such consolidation there was created a new corporation, The Union Pacific Railway Company.

7. Under and by virtue of said articles of consolidation The Union Pacific Railway Company became the owner and possessed of all the railroads, rights-of-way, privileges, franchises and properties of every kind owned by the three constituent companies.

8. The complainant is the owner and in possession of the railroads, rights-of-way, telegraph lines, privileges and franchises, including the appurtenances thereunto belonging, formerly owned and possessed by said consolidated company, The Union Pacific Railway Company, unless otherwise stated herein, and has been such owner since the year 1898; that it acquired title thereto under and by virtue of certain foreclosure proceedings and Masters' deeds issued in foreclosure proceedings against said The Union Pacific Railway Company in the United States Circuit Court for the District of Kansas and other Districts of the Federal Court in which the property of the said railway

company was located. Said foreclosure suits were brought by the United States and others to foreclose certain mortgage liens against said railroad property. The decree in such suit contains, inter alia, the following provisions:

"Section 20. Upon the confirmation of such sale and conveyances of the premises sold, the purchaser or purchasers, his or her successors or assigns, shall, subject to the possession of rights of said Receivers and subject to the liens and rights of the prior mortgages and incumbrances hereinbefore mentioned, hold and enjoy the same, and all the rights, privileges, immunities and franchises thereto appertaining. The purchaser or purchasers and his or their successors and assigns shall, subject to the liens and rights of the prior mortgagees and incumbrances hereinbefore mentioned, thereupon be entitled to have and to hold the said premises so conveyed by a full, absolute and indefeasible title, freed and discharged from all the mortgages, liens, claims and charges of the complainants herein and each and every defendant herein, and of all the parties to this cause, saving and excepting the rights of the United States Government to have the preference at all times in the use, at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of services, of the said telegraph line and railroad for the transmission of dispatches over said telegraph line and the transportation of military troops and munitions of war, supplies and public stores upon said railroad for the Government whenever required by any department thereof."

9. By certain treaties executed between the United States and the Delaware Nation on the 24th day of September, 1829, the 5th day of May, 1854, and the 30th day of May, 1860, which treaties, as printed in the United States Statutes at Large, are hereby referred to and made a part of this agreed statement of facts, the land on the north side of the Kansas river and between the points mentioned in the next following cause was set aside as a reservation for said Nation, and the said treaty of May 30, 1860, provided for the allotment in severalty to each member of the Delaware Nation of eighty acres of said land.

10. The said treaty of May 30, 1860, established a diminished reservation commonly known as the Delaware Diminished Indian Reservation, extending from a north-and-south line located about 40 rods west of the east line of sections number 21, 16, 9 and 4, in township 11, south of range 24, east, Wyandotte county, Kansas, along the north side of the Kansas river westward through Wyandotte and Leavenworth counties to the

boundary-line between Leavenworth and Douglas coun-
62 ties. All the lands in controversy in this suit are included within the boundaries of said Delaware Diminished Indian Reservation.

11. By article 3 of the said treaty of May 30, 1860, certain privileges of preemption and of preference in the purchase of the excess lands then or therefore ceded to the United States by said Indians for the benefit of said Delaware Nation were provided for and offered to the said Leavenworth, Pawnee & Western Railroad Company, and said company subsequently and on or before the 2d day of July, 1861, accepted the said benefits provided in said article 3 with respect to the purchase of said excess lands.

12. Prior to July 1, 1862, the land across which said railroad was afterwards constructed had been allotted in severalty to members of the tribe under the terms of the treaty of May 30, 1860, and they were afterwards sold and patented in fee simple by the United States for the benefit of the Indian allottees under the terms of the treaty of July 4, 1866 (14 U. S. Stat. at Large, 793), and the defendants hold by mesne conveyance under those patents, which conveyed all rights granted by said patents. No disposition of said lands other than as stated in this agreed statement of facts was made prior to said treaty of July 4, 1866.

13. The line of railway of the Union Pacific Railroad Company, the corporation created by the act of Congress of July 1, 1862, to which by said act a right-of-way was granted (as will more fully appear from said act as published in the United States Statutes at Large, Vol. 12, p. 489), did not pass through the said lands reserved to the Delaware Indians by treaty, nor through the lands allotted in severalty to the members thereof, as aforesaid, but the line of that road extended through the State of Nebraska.

The Leavenworth, Pawnee & Western Railroad Company referred to in section 9 of the aforesaid act of July 1, 1862, which said act is hereby referred to and made a part hereof, was the Leavenworth, Pawnee & Western Railroad Company incorporated by the Legislature of the Territory of Kansas by the act of 1855, as hereinbefore stated in paragraph 4, and was an entirely distinct corporation from the Union Pacific Railroad Company created by and referred to in said act of Congress.

14. The Leavenworth, Pawnee & Western Railroad Company filed its written acceptance of the provisions of the act of July 1, 1862, with the Secretary of the Interior upon December 23, 1862. On July 17, 1862, it filed a map with the Sec-

retary of the Interior showing the general route of its road, and afterwards duly filed its map of definite location showing the same route. This route started at the mouth of the Kansas river, on the south side, then crossed the river east of the east line of the Delaware Diminished Indian Reservation, and then extended west along the north side of the Kansas river clear across said Delaware Reservation, so as to connect with the Union Pacific Railroad line on the one-hundredth meridian of longitude west from Greenwich, as provided in section 9 of said act of July 1, 1862.

15. On July 2, 1864, an act amendatory of the act of July 1, 1862, was enacted, and on July 3, 1866, a second act amendatory to the act of July 1, 1862, and July 2, 1864, was enacted, and the Leavenworth, Pawnee & Western Railroad Company and its successors received and accepted the benefits granted to it by said amendatory act and complied with all the terms of said three acts, and all other acts and resolutions of Congress amendatory thereof and supplemental thereto.

63 16. The railroad of the Leavenworth, Pawnee & Western Railroad Company was constructed across the Delaware Diminished Indian Reservation on the route shown by the map filed on July 17, 1862, and was in operation clear across said Reservation within two years from July 1, 1862.

It was accepted by the proper officers of the Government, as provided in said act of July 1, 1862, and other acts and resolutions of Congress amendatory thereof and supplemental thereto, as a full compliance with the terms of said acts and resolutions.

17. The railroad so constructed continued to be operated by the Leavenworth, Pawnee & Western Railroad Company and its successors as common carriers on the line upon which it was originally constructed until the year 1898, when it became the property of the complainant, and has been operated by it ever since that time.

18. The railroad and telegraph line so constructed by the Leavenworth, Pawnee & Western Railroad Company and its successors, taken together with the railroads constructed by the aforesaid Union Pacific Railroad Company and by the Denver Pacific Railway & Telegraph Company, forming a continuous and connected line, extended from Kansas City, Missouri, clear across the state of Kansas and across the States of Colorado and Wyoming, to the town of Ogden, in Utah. And the complainant, since it became the owner of such railroads and telegraph lines in 1898, has operated them and has been engaged as a common carrier, and has

carried United States mails, munitions of war, troops and stores for the United States Government.

19. The Leavenworth, Pawnee & Western Railroad Company and its successors, including the complainant, have continuously maintained and operated said railroad, constructed through said Delaware Diminished Reservation as aforesaid, upon the original located line thereof.

20. The complainant and its predecessors have continuously maintained a fence on each side of its track and fifty feet from it through the Delaware Indian Reservation, except at stations, where its right-of-way fence has been placed at a greater distance, and defendants and their grantees have claimed to own and have used and cultivated and been in actual physical possession of all the land outside of said fence ever since the railroad was constructed. Complainant claims that the maintenance and operation of its railroad through the center of the 400-foot right-of-way which it asserts was granted to it by said act of Congress of July 1, 1862, through the Delaware Diminished Indian Reservation, gave it possession of the full width of said 400-foot right-of-way, and that the possession of the defendants of that portion thereof outside the right-of-way fence was permissive only, and subject to the possession of complainant. While on the other hand, defendants claim that their possession of that part of said 400-foot strip of land in controversy outside of said right-of-way fence, was exclusive, adverse, and hostile. The defendants have not, nor have any of them, encroached or trespassed upon the land included within said right-of-way fence of complainant, nor interfered with complainant's possession or use thereof, nor have they threatened nor intended nor confederated together to do so.

21. In 1905 the increase of its business required complainant to build a second track from Kansas City to Topeka, crossing the Delaware Diminished Indian Reservation, and it was necessary, in order to secure prompt and efficient service, to make some changes in the original track so as to do away with obstructive curves and grades, and since the filing of the bill herein complainant has actually constructed said double track and made the contemplated changes in line and grade.

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22. A few days prior to the commencement of this suit, the complainant removed its fences situated between the aforesaid strip of land 100 feet wide and the land beyond said line claimed by the respective defendants, and, without the license or consent of these defendants, entered upon, fenced in and took possssion of a part of the said land lying beyond the said

lines 50 feet from the center of its line of railway and within other lines 200 feet from the center of said line of railway on either side thereof, for the purpose of occupying and using said land for its second track, and for making changes in its original track, and excluded the said defendants from said portions thereof, and have ever since occupied and used such portions and excluded the defendants therefrom; and all these acts were done without the consent and against the objections of these defendants and of such of them as now claim to own or be entitled to the respective lands so entered upon and occupied. The complainant has so occupied and fenced in only such of the lands above referred to as were necessary to enable it to make said second track and the aforesaid alterations and extensions of its original track. The defendant resisted the said encroachment upon said lands beyond said limit of 50 feet on either side of the center of said railway, and attempted by force to regain possession thereof, and this resistance and this attempt to regain possession was the sole act of the defendants or either of them against the complainant, and constitute the only interference by said defendants, or any of them, with the complainant, its officers, agents or servants, and said resistance of the defendants and attempt to forcibly regain possession alone constitutes all the acts and conduct complained of in complainant's bill. Said entry upon said land by said complainant was made without any action brought or any process of law whatever against the defendants, or either or any of them, or any other person or persons whomsoever.

23. The complainant and its predecessors have at various times in the past in litigation against various persons and corporations asserted and defended their claim to a right-of-way 400 feet wide in the following cases: Grinter v. U. P. Ry. Co., 23 Kan. 642; State v. Horn, 34 Kan. 566; State v. Horn, 35 Kan. 717; U. P. Ry. Co. v. Hugh Shannon, in this court U. P. Ry. Co. v. Kindred, 43 Kan. 134; and U. P. Ry. Co. v. K. C. L. & T. Ry. Co., in the Court of Common Pleas of Wyandotte county; and the reported decisions in those cases are referred to and made part hereof. The opinion of the court in the case of U. P. Ry. Co. v. Hugh Shannon and of U. P. Ry. Co. v. K. C. L. & T. Ry. Co. are attached hereto and made a part hereof. None of these defendants and none of their privies or predecessors in title, were parties to any of the said suits or judgments.

24. It is further agreed, that all the documents herein referred to, whether treaties, agreements, decisions, acts of Congress, legislative acts, or otherwise, shall be taken as part of this statement of facts, and may be attached hereto by either

party if the court should hold that it is necessary so to do in order that they be considered in evidence.

N. H. LOOMIS,
R. W. BLAIR,
H. A. SCANDRETT,
Solicitors for Complainant.

G. C. CLEMENS,
A. M. HARVEY,
EDWARD D. OSBORN,
Solicitors for Defendants.

65 Opinion of Judge Brewer.

In the Circuit Court of the United States for the District of Kansas.

The Union Pacific Railway Company, Plaintiff,
vs.
Hugh Shannon, Trustee, et al., Defendants.

This is a bill to restrain defendant and his successors in office from entering upon the right of way of complainant, and from prosecuting any suits, civil or criminal, against the complainant or its employes on account of their quarrying stone on said right of way. The defendant insists that a public highway exists over said right of way and parallel to complainant's track, and his efforts and actions are simply to protect such public highway.

That the complainant owns a right of way 200 feet in width on either side of its track, has been decided by the Supreme Court of Kansas.

Grinter v. U. P. Ry. Co., 23 Kas. 642.

I, as a member of that court at the time of that decision, took part therein, and have no reason to doubt its correctness or its binding force on this court. That the proceedings of the County Commissioners of Leavenworth County, for the opening of a public highway at the place in question were insufficient, has also been decided by that court.

State v. Horn, 34 Kas. 556.

And that no public highway exists by prescription has likewise been decided.

State v. Horn, 35 Kas. 717.

While proceedings have been instituted before the County Commissioners to correct the record of the highway proceed-

66 ings, and the County Commissioners have attempted to make such correction, yet an appeal has been taken from their order, and such appeal vacates their action and leaves the matter now as through no such action had been had.

Blackshire v. R. R. Co., 13 Kas. 514.

Of course, with only these facts presented, the complainant would be entitled to protection in the peaceful enjoyment of its right of way. But defendant further insists upon an estoppel. I do not think this claim of an estoppel is made out. This alleged highway, the Duncan road, as it is called, runs on the north side of the railroad track, at the point in question. Years ago it crossed to the south of the track, about one mile and a half east, and ran on such south side for some distance. At the instance of the Superintendent of the complainant's road this part south was changed to the north side, and in consideration thereof complainant built two bridges on the line of the new road. But all this change and this work on bridges was made more than a mile and a half distant from the land in dispute. Why complainant's action as to a piece of road a mile and a half distant should estop it from pleading the truth as to this, is not apparent. Nothing was represented expressly or impliedly as to this by complainant. Defendant had equal knowledge with complainant. He was not mislead by complainant's action. He did not rely thereon and parted with nothing on the faith thereof. Scarcely a single element of estoppel can be found.

Equally immaterial is the fact testified to of complainant working out its road tax on a part of this highway, or the alleged convenience in opening a road elsewhere. The public has had ample notice and time to open a new road. I see nothing to justify interference with complainant's rights, and a decree must go as prayed for.

D. J. BREWER,
Circuit Judge.

Endorsed: No. 8300. In the Circuit Court of the United States for the District of Kansas, First Division. Union Pacific Railroad Company, Complainant vs. L. P. Kindred et al. Defendants. Agreed Statement of Facts. Filed May 12, 1906. Geo. F. Sharitt, Clerk.

67 In the Circuit Court of the United States for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
#8300 v. In Equity
L. P. Kindred, et al., Defendants.

Motion of Defendants to Suppress.

Now come said defendants severally and move the court to suppress and to exclude from consideration at the hearing of this cause, all of the Sections of the Agreed Statement of Facts signed and filed herein, except the First, Second and Third and the Twentieth, Twenty-first and Twenty-second, for the reason that the complainant having by said Twentieth, Twenty-first and Twenty-second Sections admitted of record as conclusively established facts all the material averments of the plea of the defendants, none of the other facts outside jurisdiction can be material or relevant or open to consideration but upon said facts so admitted by said complainant, the bill must be dismissed regardless of any other fact or facts.

G. C. CLEMENS,
A. M. HARVEY,
ED. D. OSBORN,
Solicitors for Defendants.

Endorsed #8300. In the Circuit Court of the United States for the District of Kansas, First Division. Union Pacific Railroad Company, Complainant v. L. P. Kindred, et al. Defendants. Motion of Defendants to Suppress. Filed June 19, 1906. Geo. F. Sharitt, Clerk.

68 In the Circuit Court of the United States,
District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
No. 8300. vs. Equity.
L. P. Kindred, et al., Defendants.

Memoranda of Decision.

The bill presented in this case is for injunction and general equitable relief.

A restraining order was granted at the institution of the suit, conditioned on complainant giving bond in the sum of twenty thousand dollars, which was done, and this order has remained in full force and effect until this date.

The case has been fully presented in oral argument, and now stands submitted for decision on the pleadings, printed briefs of solicitors, and upon an agreed statement of facts, which is as follows:

"To avoid voluminous proofs of undisputed facts, it is hereby stipulated that on the hearing of this cause the following propositions shall be taken as true, with the same effect, and no other, as if they had been conclusively established by testimony taken in the cause. That is to say, said propositions

are admitted, but neither the making of this stipulation nor anything contained in it shall be deemed an admission that any of said propositions are material, nor shall the making of this stipulation nor anything contained in it be deemed nor construed a waiver of any plea, pleading, question, matter or thing in this cause, but on the hearing the parties shall have the same right to object to any of said facts as if they had been proved by depositions offered to be read at the hearing.

"1. The complainant, Union Pacific Railroad Company, is a railroad corporation, organized and existing under and by virtue of the laws of the State of Utah, and was at the time of the bringing of this suit and still is a citzien and resident of that State.

"2. The defendants were, at the date of bringing this suit, and still are, citizens and residents of the State of Kansas.

"3. The amount in controversy in this suit, exclusive of interest and costs, exceeds the sum of two thousand dollars ($2,000).

"4. The Leavenworth, Pawnee & Western Railroad Company was a corporation created and existing under an act of the Legislature of the Territory of Kansas, enacted at the session of 1855. The act of incorporation is published in the Territorial Statutes of 1855, at page 914, and is hereby referred to and made a part hereof. The said Leavenworth, Pawnee & Western Railroad Company built a line of railway from Leavenworth to Lawrence, intending to extend it westward to form a line from Leavenworth to Fort Riley, as provided in the said incorporating act. After December 23, 1862, as hereinafter stated, the said corporation built a line of railway
69 and telegraph from Kansas City to Lawrence, which said line alone ran through or abutted upon any of the lands in controversy in this suit.

"5. The Leavenworth, Pawnee & Western Railroad Company changed its corporate name to that of the Union Pacific Railroad Company, Eastern Division, and thereafter changed its name to that of the Kansas Pacific Railway Company; the said corporations being the same ones named in the acts of Congress herein referred to.

"6. Afterwards, on or about the 24th day of January, 1880, the said Kansas Pacific Railway Company was, under authority of law, duly consolidated with two other corporations, to-wit: The Union Pacific Railroad Company, a corporation created and existing under an act of Congress entitled, 'An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the

Government the use of the same for postal, military and other purposes,' approved July 1, 1862, as is hereinafter mentioned in the 13th paragraph of this agreed statement; and the Denver Pacific Railway & Telegraph Company, a corporation created by virtue of the laws of Colorado; and by such consolidation there was created a new corporation, The Union Pacific Railway Company.

"7. Under and by virtue of said articles of consolidation The Union Pacific Railway Company became the owner and possessed of all the railroads, rights-of-way, privileges, franchises and properties of every kind owned by the three constituent companies.

"8. The complainant is the owner and in possession of the railroads, rights-of-way, telegraph lines, privileges and franchises, including the appurtenances thereunto belonging, formerly owned and possessed by said consolidated company, The Union Pacific Railway Company, unless otherwise stated herein, and has been such owner since the year 1898; that it acquired title thereto under and by virtue of certain foreclosure proceedings against said The Union Pacific Railway Company in the United States Circuit Court for the District of Kansas and other districts of the Federal Court, in which the property of the said railway company was located. Said foreclosure suits were brought by the United States and others to foreclose certain mortgage liens against said railroad property. The decree in such suit contains, inter alia, the following provisions:

"'Section 20. Upon the confirmation of such sale and conveyance of the premises sold, the purchaser or purchasers, his or her successors or assigns, shall, subject to the liens, and rights of the prior mortgages and incumbrances hereinbefore mentioned, hold and enjoy the same, and all the rights, privileges, immunities and franchises thereto appertaining. The purchaser or purchasers and his or their successors and assigns shall, subject to the liens and rights of the prior mortgages and incumbrances hereinbefore mentioned, thereupon be entitled to have and to hold the said premises so conveyed by a full, absolute, and indefeasible title, freed and discharged from all the mortgages, liens, claims and charges of the complainants herein and each and every defendant herein, and of all the parties to this cause, saving and excepting the rights of the United States government to have the preference at all times in the use, at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of services, of the said telegraph line and railroad for the transmission of dispatches over said telegraph

line and the transportation of military troops and munitions of war, supplies and public stores upon said railroad for the Government whenever required by any department thereof.'

"9. By certain treaties executed between the United States and the Delaware Nation on the 24th day of September, 1829, the 5th day of May, 1854, and the 30th day of May, 1860, which treaties, as printed in the United States Statutes at Large, are hereby referred to and made a part of this agreed statement of facts, the land on the north side of the Kansas river and between the points mentioned in the next following clause was set aside as a reservation for said Nation, and the said treaty of May 30, 1860, provided for the allotment in severalty to each member of the Delaware Nation of eighty acres of said land.

"10. The said treaty of May 30, 1860, established a diminished reservation commonly known as the Delaware Diminished Indian Reservation, extending from a north-and-south line located about 40 rods west of the east line of sections number 21, 16, 9 and 4, in township 11, south of range 24, east, Wyandotte county, Kansas, along the north side of the Kansas river westward through Wyandotte and Leavenworth counties All the lands in controversy in this suit are included within the boundaries of said Delaware Diminished Indian Reservation.

"11. By article 3 of the said treaty of May 30, 1860, certain privileges of preemption and of preference in the purchase of the excess lands then or theretofore ceded to the United States by said Indians for the benefit of said Delaware Nation were provided for and offered to the said Leavenworth, Pawnee & Western Railroad Company, and said company subsequently and on or before the 2d day of July, 1861, accepted the said benefits provided in said article 3 with respect to the purchase of said excess lands.

"12 Prior to July 1 1862, the land across which said railroad was afterwards constructed had been allotted in severalty to members of the tribe under the terms of the treaty of May 30, 1860, and they were afterwards sold and patented in fee simple by the United States for the benefit of the Indian allottees under the terms of the treaty of July 4, 1866, (14 U. S. Stat. at Large, 793), and the defendants hold by mesne conveyance under those patents, which conveyed all rights granted by said patents. No disposition of said lands other than as stated in this agreed statement of facts was made prior to said treaty of July 4, 1866.

"13. The line of railway of The Union Pacific Railroad Company, the corporation created by the act of Congress of July 1, 1862, to which by said act a right-of-way was granted (as will more fully appear from said act as published in the United States Statutes at Large, Vol. 12, p. 489), did not pass through the said lands reserved to the Delaware Indians by treaty, nor through the lands allotted in severalty to the members thereof, as aforesaid, but the line of that road extending through the state of Nebraska.

"The Leavenworth, Pawnee & Western Railroad Company referred to in section 9 of the aforesaid act of July 1, 1862, which said act is hereby referred to and made a part hereof, was the Leavenworth, Pawnee & Western Railroad Company, incorporated by the Legislature of the Territory of Kansas by the act of 1855, as hereinbefore stated in paragraph 4, and was an entirely distinct corporation from the Union Pacific Railroad Company created by and referred to in said act of Congress.

"14. The Leavenworth, Pawnee & Western Railroad Company filed its written acceptance of the provisions of the act of July 1, 1862, with the Secretary of the Interior upon December 23, 1862. On July 17, 1862, it filed a map with the Secretary of the Interior showing the general route of its road, and afterwards duly filed its map of definite location showing the same route. This route started at the mouth of the Kansas river, on the south side, then crossed the river east of the east line of the Delaware Diminished Indian Reservation, and then extended west along the north side of the Kansas river clear across said Delaware Reservation, so as to connect with the Union Pacific Railroad line on the one-hundredth meridian of longitude west from Greenwich, as provided in section 9 of said act of July 1, 1862.

71 "15. On July 2, 1864, an act amendatory of the act of July 1, 1862, was enacted, and on July 3, 1866, a second act amendatory to the act of July 1, 1862, and July 2, 1864, was enacted, and the Leavenworth, Pawnee, & Western Railroad Company and its successors received and accepted the benefits granted to it by said amendatory act and complied with all the terms of said three acts, and all other acts and resolutions of Congress amendatory thereof and supplemental thereto.

"16. The railroad of the Leavenworth, Pawnee & Western Railroad Company was constructed across the Delaware Diminished Indian Reservation on the route shown by the map filed on July 17, 1862, and was in operation clear across said reservation within two years from July 1, 1862.

"It was accepted by the proper officers of the Government as provided in said act of July 1, 1862, and other acts and resolutions of Congress amendatory thereof and supplemental thereto, as a full compliance with the terms of said acts and resolutions.

"17. The railroad so constructed continued to be operated by the Leavenworth, Pawnee & Western Railroad Company and its successors as common carriers on the line upon which it was originally constructed until the year 1898, when it became the property of the complainant, and has been operated by it ever since that time.

"18. The railroad and telegraph line so constructed by the Leavenworth, Pawnee & Western Railroad Company and its successors, taken together with the railroads constructed by the aforesaid Union Pacific Railroad Company and by the Denver Pacific Railway & Telegraph Company, forming a continuous and connected line, extended from Kansas City, Missouri, clear across the State of Kansas and across the States of Colorado and Wyoming, to the town of Ogden, in Utah. And the complainant, since it became the owner of such railroads and telegraph lines in 1898, has operated them and has been engaged as a common carrier, and has carried United States mails, munitions of war, troops and stores for the United States Government.

"19. The Leavenworth, Pawnee & Western Railroad Company and its successors, including the complainant, have continuously maintained and operated said railroad, constructed through said Delaware Diminished Reservation as aforesaid, upon the original located line thereof.

"20. The complainant and its predecessors have continuously maintained a fence on each side of its track and fifty feet from it through the Delaware Indian Reservation, except at stations, where its right-of-way fence has been placed at a greater distance, and defendants and their grantees have claimed to own and have used and cultivated and been in actual physical possession of all the land outside of said fence ever since the railroad was constructed. The complainant claims that the maintenance and operation of its railroad through the center of the 400-foot right-of-way which it asserts was granted to it by said act of Congress of July 1, 1862, through the Delaware Diminished Indian Reservation, gave it possession of the full width of said 400-foot right-of-way, and that the possession of the defendants of that portion thereof outside of the right-of-way fence was permissive only, and subject to the possession of complainant. While on the other hand,

defendants claim that their possession of that part of said 400-foot strip of land in controversy outside of said right-of-way fence, was exclusive, adverse and hostile. The defendants have not, nor have any of them, encroached or trespassed upon the land included within said right-of-way fence of complainant, nor interfered with complainant's possession or use thereof, nor have they threatened nor intended nor confederated together to do so.

72 "21. In 1905 the increase of its business required complainant to build a second track from Kansas City to Topeka, crossing the Delaware Diminished Indian Reservation, and it was necessary, in order to secure prompt and efficient service, to make some changes in the original track so as to do away with obstructive curves and grades, and since the filing of the bill herein complainant has actually constructed said double track and made the contemplated changes in line and grade.

"22. A few days prior to the commencement of this suit, the complainant removed its fences situated between the aforesaid strip of land 100 feet wide and the land beyond said line claimed by the respective defendants, and, without the license or consent of these defendants, entered upon, fenced in and took possession of a part of the said land lying beyond the said lines 50 feet from the center of its line of railway and within other lines 200 feet from the center of said line of railway on either side thereof, for the purpose of occupying and using said land for its second track, and for making changes in its original track, and excluded the said defendants from said portions thereof, and have ever since occupied and used such portions and excluded the defendants therefrom; and all these acts were done without the consent and against the objections of these defendants and of such of them as now claim to own or be entitled to the respective lands so entered upon and occupied. The complainant has so occupied and fenced in only such of the lands above referred to as were necessary to enable it to make said second track and the aforesaid alterations and extensions of its original track. The defendants resisted the said encroachment upon said lands beyond said limit of 50 feet on either side of the center of said railway, and attempted by force to regain possession thereof, and this resistance and this attempt to regain possession was the sole act of the defendants or either of them against the complainant, and constitute the only interference by said defendants, or any of them, with the complainant, its officers, agents or servants, and said resistance of the defendants and attempt to forcibly regain possession alone constitutes

all the acts and conduct complained of in complainant's bill. Said entry upon said land by said complainant was made without any action brought or any process of law whatever against the defendants, or either or any of them, or any other person or persons whomsoever.

"23. The complainant and its predecessors have at various times in the past in litigation against various persons and corporations asserted and defended their claim to a right-of-way 400 feet wide in the following cases: Grinter v. U. P. Ry. Co., 23 Kan. 642; State v. Horn, 34 Kan. 566; State, v. Horn, 35 Kan. 717; U. P. Ry. Co., v. Hugh Shannon, in this court, U P. Ry. Co., v. Kindred, 43 Kan. 134; and U. P. Ry. Co., v. K. C. L. & T. Ry. Co., in the Court of Common Pleas of Wyandotte county; and the reported decisions in those cases are referred to and made part hereof. The opinion of the court in the case of U. P. Ry. Co., v. Hugh Shannon and of U. P. Ry. Co., v. K. C. L. & T. Ry. Co., are attached hereto and made a part hereof. None of these defendants and none of their privies or predecessors in title, were parties to any of the said suits or judgments.

"24. It is further agreed, that all the documents herein referred to, whether treaties, agreements, decisions, acts of Congress, Legislative acts, or otherwise, shall be taken as part of this statement of facts, and may be attached hereto by either party if the court shall hold that it is necessary so to do in order that they be considered in evidence."

73 The pleadings in the suit and agreed facts raise three questions for decision: (1) Was the right-of-way granted by Congress to the Leavenworth, Pawnee & Western Railroad Company by virtue of the act of Congress of July 1, 1862, a present, absolute grant of a perpetual easement in a strip of land four hundred feet in width across the Deleware Diminished Indian Reservation as it stood at the date of the grant allotted in severalty to members of that tribe? (2) If so, has the grantee therein, or its successors in right, by non-user, adverse possession, or in other manner lost any part of the right-of-way so granted? (3) If not, can complainant repossess itself of any portion of said right-of-way in the manner and for the purpose stated in the agreed facts, and by resort to the equity powers of this court secure itself in the use and enjoyment of all of said right-of-way as against defendants, who have for many years been in the actual possession of portions thereof, cultivating the same, or must complainant resort to its action in ejectment or other legal or statutory remedy to recover such portions of its right-of-way?

Of these questions in their order.

It is freely conceded by solicitors for defendants, as the title to the allotted land across which the right-of-way in question was granted was at the date of the grant vested in the United States, Congress on its behalf had the power to make the grant of the right-of-way four hundred feet in width, as claimed by complainant, and the contention made by defendants is not a want of power in Congress to make the grant as claimed, but it is that it is not shown by the act of Congress under which complainant claims, that Congress did so grant. It is conceded by defendants the complainant is entitled to hold and use a right-of-way one hundred feet in width across all lands in question. It is also conceded complainant is successor in right to all the right-of-way granted to the Leavenworth, Pawnee, & Western Railroad Company not lost by adverse possession or non-user. Hence, the sole question on this branch of this case is, what was the grant of the right-of-way to the Leavenworth, Pawnee & Western railroad Company?

The Act of Congress of July 1, 1862, incorporated the Union Pacific Railway Company, and authorized it to construct a line of railroad and telegraph from the city of Omaha in the State of Nebraska toward the Pacific coast. The grant of right-of-way of this road was made by section 2 of the act, in the following language:

"Sec. 2. And be it further enacted, That the right-of-way through the public lands be, and the same is hereby granted to said company for the construction of said railroad and telegraph line; and the right, power and authority, is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right-of-way is granted to said railroad to the extent of two hundred feet in width on each side of the said railroad where it may pass over
74 the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side-tracks, turn-tables, and water stations. The United States shall extinguish as rapidly as may be the Indian title to all lands falling under the operation of this act and required for the said right-of-way and grants hereinafter made."

That this act in clear and unequivocal terms makes a present, absolute grant of right-of-way for the Union Pacific Railroad Company of four hundred feet in width across and over the public lands without reservation or exception, and subject

to no condition save the acceptance of the grant and the building of the road, is not open to dispute and cannot be doubted. (Union Pac. Ry. Co. v. Douglas County, 31 Fed. 540.) Also, by the express terms of the grant, Congress obligated the Government to extinguish as rapidly as may be the Indian title to any and all lands falling within the terms of the grant. The peculiar necessities of the Government which impelled the making of this particuar grant liberal in all things to the grantee, and the benefits the Govenment sought to acquire by the building of the road which induced its making, are clearly expressed by Mr. Justice Davis in United States v. Union Pacific R. R. Co., 91 U. S. 72.

The fact that Congress made the grant of right-of-way four hundred feet in width is a conclusive determination of the question that a right-of-way of this width is required to carry out the work projected, and that any less amount is not sufficient for that purpose. (Northern Pacific Railroad Co. v. Smith, 171 U. S. 275.)

In what has been said reference has been made to section 2 of the act making grant of right-of-way to the Union Pacific Railroad Company. Does it also apply to the grant of right-of-way made to the Leavenworth, Pawnee & Western Railroad Company under section 9 of the act?—for by that section the grant in question was made. It is there provided as follows:

"Sec. 9. And be it further enacted, That the Leavenworth, Pawnee & Western Railroad Company of Kansas, are hereby authorized to construct a railroad and telegraph line, from the Missouri river, at the mouth of the Kansas river on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one-hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid."

As has been seen, the terms of the grant of right-of-way to the Union Pacific Railroad Company was a present, absolute grant of a right-of-way four hundred feet in width where the line of road passed over and across any of the public lands of the United States, the Government obligating itself by the terms of the grant to extinguish as rapidily as may be the
Indian title to any lands falling within the terms
75 of the grant. The conditions of the grant were its acceptance by the grantee and the building of the

road within the time specified. Hence, as the grant to the Leavenworth, Pawnee & Western Railroad Company was made "upon the same terms and conditions in all respects," it follows, as a necessary sequence, the grant to it was a present, absolute grant of right-of-way four hundred feet in width over all public lands over which it might cross, the Government obligating itself by the terms of the grant to extinguish the Indian title to any lands over which it might cross. And as the company complied with the conditions attached to the grant, it acquired such a right-of-way over the lands in question, precisely as was granted to the Union Pacific Company, and did acquire such a right-of-way over the allotted lands in the Delaware Diminished Indian Reservation, if at the time of the grant they were public lands within the intendment of the act. The Delaware tribe of Indians, by virtue of treaties made with the United States, first acquired the right of possession over the lands in question. Subsequently these lands, under treaty provisions, were allotted in severalty to individual members of the tribe. That is, by such allotment the individual members of the Delaware tribe of Indians succeeeded to the right of possession in his particuliar allotment theretofore possessed by the tribe. The ultimate title to the lands, however, at all times was and remained in the Government, and as shown by the agreed facts, under a subsequent treaty of July 4, 1866, was sold and patented by the Government for the benefit of the allottee. The grant of the right-of-way in the act in question, as has been seen, is a present, absolute grant of a perpetual easement over the lands, on condition, and unlike the grant of indemnity lands, is made subject to no exception in favor of preemption or homestead claimants, nor are reservations theretofore made by the Government for Indians, or for other purposes, exempt from the express terms of the grant. Therefore, I am clearly of the opinion from the language of the act, Congress intended to and did grant the right-of-way in question across all lands to which the Government held the title, without reservation. For, from the very fact that Congress in express terms made the grant of right-of-way without exception or reservation, it must be conclusively presumed to have so intended. (Union Pacific Ry. Co. v. Douglas County, supra; Railroad Co. v. Baldwin, 103 U. S. 426; Grinter v. U. P. Rly. Co., 23 Kan. 642.)

Therefore, it must be held, I think, Congress not only has the power, but did, by the express terms of the act in question, grant to the Leavenworth, Pawnee & Western Railroad Company a right-of-way four hundred feet in width across the allotted Indian lands within the Delaware Diminished

Indian Reservation, to which allotments the defend-
76 ants have succeeded by mesne conveyances, and that complainant as successor of the Leavenworth, Pawnee & Western Railroad Company is entitled to claim such right-of-way unless it has been lost by non-user or adverse possession.

As seen from paragraph twenty of the agreed facts, the Leavenworth, Pawnee & Western Railroad Company, grantee, constructed its right-of-way fence fifty feet from the center line of the track, and its successors have, at all times since, until about the date of the commencement of this suit, continued to thus maintain them, while the defendants, or their grantors, took actual physical possession of the remaining three hundred feet of the right-of-way granted, and have used, cultivated and claimed to own the same ever since the completion of the road.

The statutory period of limitations in this State for the recovery of real estate, or any interest therein, is fifteen years. (Sec. 4444, Gen. Stat. 1901.) This is a statute of repose. (Sec. 4453, Gen. Stat. 1901.)

"When the bar of this statute becomes complete, however, destitute of the color of title such occupancy may have been under, to the extent it was actual, visible and continuous, a title by prescription arises in the adverse occupant. This title is in all respects equal to a conveyance in fee."

3. Washburn on Real Property, 5th ed. 149, quoted with approval in Goodman v. Nichols, 44 Kan. 29.

Such being the facts and the law of this State, defendants contend their exclusive, adverse and hostile possession of that portion of the right-of-way lying outside of the right-of-way fences gives them a right thereto by prescription.

Complainant contends such possession by defendants was permissive only, and subject to its possession.

It must be conceded under the agreed facts the defendants have shown as good title by adverse possession under the law of this State as would be a conveyance in fee from complainant. And, unless the very nature of the property itself and the use to which it is dedicated takes it out of the general rule, complainant by non-user and by permitting defendants to take and maintain the actual, open, notorious, adverse possession of such portions of its right-of-way as lay beyond its right-of-way fence, under claim of ownership, has lost all title and right thereto.

It therefore becomes material to inquire whether there is

anything in the nature and character of the property itself and the purpose to which it is dedicated which renders the general rule of law as applied by the higest judicial tribunal of this State inapplicable thereto.

As has been seen, the act of Congress making the grant or the right-of-way at four hundred feet in width to the Leavenworth, Pawnee & Western Railroad Company, in aid of a vast public enterprise in which the Government itself had a deep interest, was a conclusive determination of
77 the facts that one hundred feet or any less amount than four hundred feet in width was inadequate to the accomplishment of the purpose designed by the Government, and such determination of the necessity for the grant cannot be disputed by anyone, even the grantee itself. And from this very fact the grantee or its successor in such public undertaking cannot, without the sanction of Congress, either directly or indirectly divest itself of any part of that right-of-way four hundred feet in width which the Government has determined is essential to the successful carrying forward of that which, in reality, was a great governmental project to be executed through private persons with governmental aid. Hence, any conveyance made by the company itself to a third party, or any claim of right in or title to any part of such right-of-way made by a third party, whether by purchase from the grantee company or its successors, or by adverse possession, or otherwise, not sanctioned by Congress acting for the Government, is void, of no effect, and cannot be upheld; and to this extent go the adjudicated cases.

7. In Northern Pacific Ry. v. Townsend, 190 U. S. 270 Mr. Justice White, delivering the opinion of the court, says:

"Conceding the adverse possession and its efficacy under the State law as against the railroad right-of-way, to be as found by the State court, the sole question which arises then for decision is whether, in view of the provisions of the act of Congress to which we have referred, an asserted title by adverse possession can be made efficacious as respects the property in controversy. And depending, as this question does, upon the nature and effect of the acts of Congress, its solution necessarily involves a Federal question.

"In determining whether an individual, for private purposes may, by adverse possession, under a State statute of limitations, acquire title to a portion of the right-of-way granted by the United States for the use of this railroad, we must be guided by the doctrine enunciated in Packer v. Bird, 137 U. S. 661, 669, and approvingly referred to in Shively v. Bowlby, 152 U. S. 44, viz.: 'The courts of the United States

will construe the grants of the General Government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attached to the ownership of property conveyed by the Government will be determined by the States, subject to the condition that their rules do not impaid the efficacy of the grants or the use and enjoyment of the property by the grantee.' Following decisions of this court construing grants of rights-of-way similar in tenor to the grant now being considered, New Mexico v. United States Trust Co., 172 U. S. 171, 181; St. Joseph & Denver City R. R. Co. v. Baldwin, 103 U. S. 426 it must be held that the fee passed by the grant made in section 2 of the act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the Baldwin case) 'to those necessarily implied, such as that the road shall be .....used for the purposes designed.' Manifestly the land forming the right-of-way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly
78 stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right-of-way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right-of-way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portions thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly, for, as said in Grand Trunk Railroad v. Richardson, 91, U. S. 454, 468, 'a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted.' Nor can it be rightfully contended that the portion of the right-of-way appropriated was not necessary for the execution of the powers conferred by Congress, for as said in Northern Pacific Railroad Co. v. Smith, 171 U. S. 261, 275, speaking of the very grant under consideration: 'By granting a right-of-way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.'

Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right-of-way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right-of-way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

"To repeat, the right-of-way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right-of-way should continue in the original grantee, its successor and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right-of-way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a little good as against the railroad company."

That case was reaffirmed by the Supreme Court in Northern Pacific Railway Company v. Ely, 197 U. S. 1.

Hence, it must be held, I think, on account of the very nature of the property itself, the purpose to which it was dedicated by the granting act, and from the interest of the Government itself in the execution of the enterprise, that the grantee company not only did not lose any portion of such right-of-way by any act of non-user, or by any acquiescence in the possession of the defendants, or their grantors, but that by no act positive or negative in character which the grantee or its successors could have done, without the sanction of Congress, could operate to take away a portion of such right-of-way or any interest therein from the grantee or its successors.

79 The remaining question for decision relates to the method adopted by complainant to repossess itself of the three hundred feet in width of its right-of-way lying outside the right-of-way fence, such portions of the right-of-way having been in the actual possession of defendants from the date of the construction of the road until shortly before the institution of this suit. And the further question of the power and jurisdiction of this court by injunction to prohibit defendants from interfering with the possession and use of the entire right-of-way by the railroad company.

As appears from the agreed facts, paragraph 21, since the completion of the road until shortly before the institution of this suit the road had been operated as a single-track road. By reason of an increase in its business it became necessary

for complainant to construct another track, making a double-track road. In order to properly construct such double-track remove curves and reduce grades in its line, complainant removed its right-of-way fences, and without the consent of defendants and against their will and protest took possession of its full right-of-way until, being resisted by defendants, complainant applied to and secured from this court an order restraining defendants from in any way interfering with complainant in taking and retaining possession of its right-of-way for necessary railway purposes; and on this hearing a perpetual injunction is sought, forever barring defendants or those to claim under them from interfering with the complainant or its successors in right in the occupancy and use of its entire right-of-way.

On the theory that complainant was not entitled to thus retake possession of its right of-way which had been in the actual possession of defendants, or their grantors, since the construction of the road, and for much more than the statutory period of limitations in this State, in the manner described in the agreed facts, but contending that for such purposes and for the purpose of trying the right of title to the property, resort must be had to a court of law, the defendants filed a plea to the jurisdiction of the court. This plea to its presentation was ordered to stand over until answer, and by way of answer defendants raised the same objection sought to be made by the plea.

The claim is made by complainant that by answering the whole bill defendants have waived their right to insist upon the plea. However, I do not consider the claim made to be possessed of any merit, for the objection taken being want of jurisdiction, and that complainant does not come with clean hands in that it seeks to retain and be protected in the use and enjoyment of that which it has acquired by force from its adversaries, if it be shown by the proofs such objection is well taken, a court of equity will not hesitate to dismiss the bill for want of equity or to deny the guilty com-
80 plainant relief. (Marble Company v. Ripley, 10 Wall. 339; Manhattan Medicine Co. v. Wood, 108 U. S. 218; Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 111 Fed. 284.)

The pleadings are therefore held sufficient to raise the question of the court's jurisdiction to grant the relief prayed by complainant and to present the question of complainant's claimed iniquity in dealing with the subject-matter of the suit relied upon by defendants to preclude the granting of any relief to complainant.

In the decision of these questions it is well to inquire what the position of the parties to this litigation was toward the property in dispute at the inception of this controversy. As has been seen, there was granted to the Leavenworth, Pawnee & Western Railroad Company the possession, use and enjoyment of its right-of-way to its full width of four hundred feet, and complainant has succeeded to this right. This right was granted by a public act of Congress, and hence was known to defendants. By their use and occupancy of a portion of the right-of-way thus granted, defendants acquired no rights thereto or interest therein, for, under the law, no act or omission or commission on the part of the Leavenworth, Pawnee & Western Railroad Company, or its successors, such as non-user, inaction, acquiescence, or even a conveyance itself, could operate to confer any right, title, interest or estate in the right-of-way upon defendants without the sanction of Congress. Therefore, the position of defendants was that of one in the permissive possession of the property until its use should be deemed necessary by the complainant in the execution of the public purpose for which the grant was made. While it must be conceded as contended by solicitors for defendants, as a general rule, one out of possession of real property claiming title and right of possession thereto against another in possession under claim of title and right of possession, must resort to his action at law to try the title and acquire possession, but that rule has no application here, for, on the grounds above stated, the title to the right-of-way is not in dispute in this case and cannot be drawn into controversy by defendants. The question of title is settled by the public act of Congress making the grant, hence complainant was not compelled to resort to an action at law to settle any question of its title.

Again, while there is in this State the statutory remedy of forcible detainer which provides for the recovery of the possession of real estate in which the question of title cannot be drawn in controversy where the original entry was unlawful, or, the entry being lawful, the continued possession becomes unlawful, yet such remedy is not available
81 here, for, in such case, original jurisdiction is by the statute creating the remedy lodged in an inferior local court not of record; hence, courts of record of the State, in the exercise of their general jurisdiction, cannot take original but appellate jurisdiction only of such controversy.

Again, it is manifestly unnecessary under the facts of this case for complainant to proceed by condemnation proceedings if that remedy were open to complainant, which must be doubted, for here defendants have no rights in the property in dispute to cut off or to be acquired by complainant which it

does not already possess under the law. As shown by the agreed facts, complainant, when the necessities of its business demanded, proceeded peaceably to the construction of an additional track, the reduction of grades along its line and the elimination of curves therefrom. When resisted by defendants, who long but without right save the permission of complainant and its predecessor, had occupied and cultivated portions of this right-of-way now needed by complainant in the execution of that public purpose for which the way was granted, applied to this court to restrain defendants from interfering with it in the use of that to which it was clearly entitled by law, and to the use of which defendants were not entitled, as against complainant, and for protection from defendants in the perpetual enjoyment of the right granted by Congress.

The rule is well settled and of universal application, that a court of equity will not decline jurisdiction on the ground of a remedy at law unless the legel remedy afforded is as full, adequate, complete and efficient as that afforded in equity. The right of complainant to the property in dispute is established by the law conferring the right. The grant was made in the execution of a public purpose. While it is being exercised by a private corporation, it is for the benefit of the public. The actual possession and control of the property granted having become by lapse of time necessary to the complainant in the execution of this public purpose, as Congress conclusively determined it would be when the grant was made, and proceeding in compliance with the determination expressed in the grant, it undertook the removal of obstructions and the extension and betterment of its facilities for the transaction of the duty it owed the public. This it had the right to do by peaceable means. Being resisted by defendants in the exercise of its clear legal right as established by law, complainant applied to this court for protection against defendants in the exercise of such established legal right. The defendants are numerous and the enforcement of any legal right which it might be conceived complainant possessed would have required many actions at law. Surely, therefore, if any legal remedy was open to complainant it was not as full, adequate, complete or efficient as resort to the restraining arm of this

82 court.

As shown by paragraph 22 of the agreed facts, it was only when defendants by force attempted to retake the possession of that which of right belonged to the possession of complainant, and to which defendants had no right, and which complainant by peaceable means had secured in the exercise of its undoubted right in the performance of a duty owed the public, that resort was had to this court.

Therefore, I am of the opinion complainant may not and should not in this case be held guilty of such iniquity as to debar it the relief prayed. As tending to show the relief here sought by complainant's bill is proper under the circumstances of this case, see Jones on Easements, sec. 889, et seq., and cases cited; Cyc. L. & P., subject, Easements, Vol. 14, p. 1216; Webb v. Comm'rs Butler Co., 52 Kan. 375; Pennsylvania R. Co. v. Borough of Freeport, 20 Alt. Rep. 940; Driggs v. Phillips, 103 N. Y. 77.

It follows, from what has been said, the complainant is entitled to the relief prayed, and it is accordingly granted.

Done at Topeka, Kans., Feby. 9th, 1907.

(Signed) JOHN C. POLLOCK, Judge.

Endorsed: No. 8300. U. P. R. R. Co. vs. L. P. Kindred, et al. Opinion. Filed Feb. 9, 1907. Geo. F. Sharitt, Clerk.

83 In the Circuit Court of the United States for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant.
No. 8300. vs. In Equity.
L. P. Kindred, et al., Defendants.

Decree.

This cause came on for hearing on the bill of complaint and the amendment thereto, the answer of the defendants and the replication thereto; and thereupon it was by and between counsel for the parties, with the consent of the court, agreed that said cause should be submitted on an agreed statement of facts on this final hearing; and thereupon the cause was duly submitted to the court upon an agreed statement of facts, and was duly argued by counsel.

Upon consideration whereof, the court, being fully advised in the premises, do find that the equity in the case is with the complainant as against the said defendants, L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDaniel, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, ... Aldridge, John Burns, B. Friedburg, John B. Rees, C. F. Barker, Thomas Warren, Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Groves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Ida Harvey, ... Harvey, ... Kanopp, C. M. Miller, and ..... Proudy, and that the said Union Pacific Railroad Company is entitled to the relief for which it prays as against them.

It is therefore accordingly ordered, adjudged and decreed by the court, that the complainant, Union Pacific Railroad Company, is the owner and as such is entitled to the quiet and exclusive possession of a right-of-way four hundred feet in width, being two hundred feet on each side of its railroad track as the same was originally constructed across the Delaware Diminished Indian Reservation, situate on the north side of the Kansas river, and extending from a north-and-south line located about 40 rods west of the east line of sections number 21, 16, 9 and 4, in township 11, south, range 24 east, Wyandotte county, Kansas, to the boundary line between Leavenworth and Douglas counties, in the State of Kansas.

And it is further ordered, adjudged and decreed, that the restraining order heretofore granted in this cause restraining and enjoining the defendants, L. P. Kindred, C. L. Kindred, S. D. Knight, Jesse Haney, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDanield, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Trant, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea,
84 H. W. Rhea, ... Aldridge, John Burns, B. Friedburg, John B. Rees, C. F. Barker, Thomas Warren, Mrs. L. S. Bowers, P. H. Kughns, Charles Sandberg, Edwin Taylor, J. G. Groves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea, Jr., J. M. Hooper, John Fore, Martin Kapp, Ida Harvey, ... Harvey, ... Kanopp, C. M. Miller, and ..... Proudy, their servants, employes, agents, workmen and all persons under their authority, direction or control from entering upon any part of the right-of-way above described, or from interfering with the complainant in any way in the use and enjoyment thereof, be and the same is hereby made perpetual; and that said defendants pay all the costs herein made.

Done at Topeka, Kansas, February 9th, 1907.

JOHN C. POLLOCK, Judge.

Endorsed: No. 8300. Union Pacific Rl'd Co. vs. L. P. Kindred et al., Defts. Final Decree. Filed Feb. 9, 1907. Geo. F. Sharitt, Clerk.

85 In the Circuit Court of the United States, in and for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,

vs.

L. P. Kindred, et al., Defendants.

Petition for allowance of Appeal.

The above named defendants and each of them consider themselves aggrieved by the orders and decrees made and en-

tered in the above entitled cause on the 9th day of February, 1907, and on the previous days for the reasons set out in the assignment of errors filed herein, and said defendants do hereby appeal from said orders and decrees to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and they pray that their appeal be allowed, and that a transcript of the record, appearances and proceedings upon which said orders and decrees were made, duly authenticated, may be sent to the said United States Court of Appeals.

A. M. HARVEY,
EDWIN D. OWSBORN,
FRANK DOSTER,
Solicitors for defendants.

Endorsed: No. 8300. In the Circuit Court of the United States in and for the District of Kansas, First Division. Union Pacific Railroad Co., Complainant, vs. L. P. Kindred, et al., Defendants. Petition for allowance of Appeal. Filed July 8, 1907. Geo. F. Sharitt, clerk.

86 In the Circuit Court of the United States, in and for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
vs.
L. P. Kindred, et al., Defendants.

Assignment of Errors.

Come now the defendants and each of them above named and file the following assignment of errors on which they will rely in the prosecution of their appeal in the above entitled cause.

First. The Circuit Court of the United States for the District of Kansas, First Division, erred in overruling the demurrer interposed by the defendants to the bill of complainant filed in this cause, and by holding and deciding that the matters and things stated in said bill constituted grounds in equity for any relief against said defendants or any of them.

Second. The Circuit Court of the United States for the District of Kansas, First Division, erred in overruling and denying the plea of the said defendants to the bill of complainant in said cause.

Third. The Circuit Court of the United States for the District of Kansas, First Division, erred in holding and deciding that the agreed statement of the facts in said case entered into and signed by the solicitors for said complainant and said defendants constituted proof of the allegations of the complainant's bill in said cause.

87 Fourth. The Circuit Court of the United States for the District of Kansas, First Division, erred in rendering and entering its final decree in said cause on the pleadings and proof therein in favor of complainant, and in decreeing to said complainant the relief prayed for in its bill.

Wherefore, in order that the foregoing assignment of errors may be and appear of record the defendants herein present the same to the court and pray that disposition be made thereof in accordance with the law and statutes of the United States in such cases, and that a [reversale] may be had of the orders and final decree made and entered by said court.

A. M. HARVEY,
EDWIN D. OWSBORN,
FRANK DOSTER,
Solicitors for defendants.

Endorsed: No. 8300. In the Circuit Court of the United States, in and for the District of Kansas. First Division. Union Pacific Railroad Co., Complainant, vs. L. P. Kindred, et al., Defendants. Assignment of Errors. Filed July 8, 1907. Geo. F. Sharitt, clerk.

88 In the Circuit Court of the United States, in and for the District of Kansas, First Division.

Union Pacific Railroad Company, Complainant,
vs.
L. P. Kindred, et al., Defendants.

Order Allowing Appeal.

On this day, to-wit, the 16" day of July, 1907, before the Hon. John F. Philips, Judge of the Circuit Court of the United States for the District of Kansas (assigned) on a motion of the solicitors for defendants it is ordered that an appeal to the United States Circuit Court of Appeals of the Eighth Judicial Circuit be and the same is hereby allowed from the final decree heretofore filed and entered herein, and that a certified transcript of the record, exhibits and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

And it is further ordered that the said defendant do give a bond on appeal herein in the sum of $500.00.

JNO. F. PHILIPS, Judge.

Endorsed: No. 8300. In the Circuit Court of the United States, in and for the District of Kansas. First Division. Union Pacific Railroad Co., Complainant, vs. L. P. Kindred, et al., Defendants. Order allowing appeal. Filed July 16, 1907. Geo. F. Sharitt, clerk.

89 In the Circuit Court of the United States,
in and for the District of Kansas,
First Division.

Union Pacific Railroad Company, Complainant,
vs.
L. P. Kindred, et al., Defendants.

Bond.

Know All Men By These Presents, That we the undersigned, defendants in the above entitled action, jointly and severally, as principals, and the American Bonding Company of Baltimore as surety, are held and firmly bound unto the Union Pacific Railroad Company in the full and just sum of $500.00 to be paid to said Union Pacific Railroad Company its treasurer, attorneys, agents, successors, or assigns, to which payment well and truly to be made be bind ourselves, heirs, executors, administrators jointly and severally by these presents.

The conditions of this obligation is that, whereas, lately at a session of the Circuit Court of the United States for the District of Kansas, First Division, in a suit pending in said court wherein the said Union Pacific Railroad Company was complainant and the above named defendants were defendants a final decree was rendered against said defendants, and the said defendants having obtained from said court the allowance of an appeal to reverse the said decree in the aforesaid suit, and a citation therein directed to said Union Pacific Railroad Company.

90 Now, therefore, the condition of this bond is that if the said defendants above named shall prosecute their appeal to effect, and shall pay all costs that may be awarded against them or any of them if they fail to make their plea good then the above obligation to be void, otherwise to remain in full force and effect.

L. P. KINDRED, JAMES TRANT,
EDWIN TAYLOR, J. D. WATERS,
JESSE HANEY, C. L. KINDRED.

[Seal] AMERICAN BONDING COMPANY
OF BALTIMORE,
By John V. Abrahams,
Its Attorney in Fact for Kansas.

The foregoing bond is approved this 16" day of July, 1907.

JNO. F. PHILLIPS, Judge.

Endorsed: No. 8300. U. P. R. R. Co., vs. L. P. Kindred, et

al. Bond on Appeal. Filed July 16, 1907. Geo. F. Sharitt, clerk.

91 United States of America,
District of Kansas—ss.

I, George F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings in said court in case No. 8300 wherein The Union Pacific Railroad Company is Complainant and L. P. Kindred, et al., are defendants.

I further certify that the Original Citation is hereto attached and returned herewith.

Seal Circuit Court United States. District of Kansas. 1862.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas this 17th day of July, A. D. 1907.

G. F. SHARITT, Clerk.

Filed Jul. 29, 1907. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellants.*)

On the thirty-first day of July, A. D. 1907, the appearance of counsel for appellants was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2671.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY.

The Clerk will enter my appearance as Counsel for the Appellants.

A. M. HARVEY,
Topeka, Kansas.
EDWARD D. OSBORN,
Topeka, Kansas.
FRANK DOSTER,
Topeka, Kansas.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2671. L. P. Kindred, et al., Appellants, vs. Union Pacific Railroad Company. Appearance. Filed Jul- 31, 1907, John D. Jordan, Clerk. A. M. Harvey, Edward D. Osborn, Frank Doster, Counsel for Appellants.

(*Appearance of Counsel for Appellee.*)

And on the thirtieth of September, A. D. 1907, the appearance of counsel for appellee was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2671.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY.

The Clerk will enter my appearance as Counsel for the Appellee.

N. H. LOOMIS,
R. W. BLAIR, AND
H. A. SCANDRETT,
Topeka, Kansas.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2671. L. P. Kindred, et al., Appellants, vs. Union Pacific Railroad Company. Appearance. Filed Sep. 30, 1907, John D. Jordan, Clerk. N. H. Loomis, R. W. Blair, H. A. Scandrett, Counsel for Appellee.

(*Order of Argument.*)

And on the seventh day of May, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an order of argument in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1908.

No. 2671.

THURSDAY, *May* 7, 1908.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY.

Appeal from the Circuit Court of the United States for the District of Kansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Frank Doster in behalf of the appellants, and the hour for adjournment having arrived further argument is postponed until tomorrow.

(*Order of Submission.*)

And on the eighth day of May, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1908.

No. 2671.

FRIDAY, *May* 8, 1908.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY.

Appeal from the Circuit Court of the United States for the District of Kansas.

This cause having been called for further hearing, argument was concluded by Mr. R. W. Blair for appellee.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twelfth day of February, A. D. 1909, the opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1908.

No. 2671.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. Frank Doster (Mr. A. M. Harvey and Mr. Edward D. Osborn were with him on the brief) for the appellants.

Mr. R. W. Blair (Mr. N. H. Loomis and Mr. H. A. Scandrett were with him on the brief) for the appellee.

Before Sanborn and Hook, Circuit Judges, and Philips, District Judge.

HOOK, Circuit Judge, delivered the opinion of the court:

This was a suit by the Union Pacific Railroad Company as the successor of the Leavenworth, Pawnee and Western Railroad Company against L. P. Kindred and others to enjoin them from entering upon and interfering with its right of way in Wyandotte and Leavenworth Counties, Kansas, along the north side of the Kansas River through lands within what was once the Delaware Indian Diminished Reservation. The railroad company claims a right of way 400 feet in width under a congressional grant to its predecessor in title. The defendants who are owners of adjacent lands concede a right of way 100 feet in width, founded, however, only on adverse possession, and are not interfering therewith; but they deny the construction of the act of Congress contended for by the railroad company. The trial court gave the railroad company a decree and the land owners have appealed. Three questions are presented: Had Congress power to grant any right of way across the lands? If so, did it exercise it? Is the case of equitable cognizance?

The grounds of the contention that Congress had no power to grant a railroad right of way across the lands in question may be briefly stated as follows: By the treaty of 1829 made with the Delaware Nation of Indians (7 Stat. 327) it was provided that the country in the fork of the Kansas and Missouri rivers within defined limits "be conveyed and forever secured by the United States to the said Dela-

ware Nation as their permanent residence" and the United States guaranteed "the quiet and peaceable possession and undisturbed enjoyment of the same against the claims and assaults of all and every other people whatsoever." By the treaty of 1854 (10 Stat. 1048) the Delawares relinquished a part of the reservation to the United States for an expressed consideration, and another part was given up to be sold for their benefit. The remainder, which was retained for their "permanent home," was known as the Delaware Diminished Reservation. It was provided by Article 11 of this treaty that whenever the Delawares desired it the reservation retained should be surveyed and there should be made a uniform assignment of portions thereof to each person or family as designated by the principal men of the tribe; and by article 12 that railroad companies should have a right of way on payment of a just compensation. The desire of the Delawares for an assignment in severalty led to the treaty of 1860 (12 Stat. 1129) which provided that eighty acres of the reservation should be assigned to each member of the tribe, and the remainder, with some specified exceptions, should be disposed of for their benefit. The contention is that the effect of this treaty was to vest in the individual assignees an equitable title in fee and that it was, therefore, beyond the power of Congress thereafter to grant a right of way across the lands so assigned without the consent of the assignees and without the existence and due exercise of the right of eminent domain. It does not appear that after the assignment in severalty the assignees individually assented to the grant of the right of way by Congress, nor does it appear that proceedings in condemnation were instituted. The right of way rests upon a direct grant to the Leavenworth, Pawnee and Western Railroad Company contained in the Act of July 1, 1862 (12 Stat. 489). The inquiry is therefore directed to the character of the right or title obtained by the individual Indians by the assignment to them of portions of the reservation in accordance with the treaty of 1860. "Was it a mere right of occupancy with no power to convey the land except to the United States or by their consent? Or was it substantially a title in fee simple with full power of alienation?" That was the test applied in *Jones* v. *Meehan*, 175 U. S. 1, and *Francis* v. *Francis*, 203 U. S. 233. It was held in those cases that a title in fee may pass to an individual Indian by the operation of a treaty without the aid of an act of Congress and without the evidence of a patent. But it is not doubted that, if the right secured was merely one of occupancy and did not differ from the previous right of the tribe except that it was several instead of communal, the United States retained the title and the dominion and control customarily exercised over Indian reservations and lands.

We think the treaty of 1860 evidences a studied purpose not to vest title in the Indians severally and place it beyond the control of the Government but merely to convert the tribal or communal right of occupancy into a several one. It was an experimental step towards developing a capacity for individual ownership. The usual indicia of a transfer of title are wholly absent except the provisions "that the tracts are set apart for the exclusive use and benefit of the assignees and their heirs" and that prior to the issue of the certificates of assign-

ment "the Secretary of the Interior shall make such rules and regulations as he may deem necessary or expedient, respecting the disposition of any of said tracts, in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased persons." But the inference that might otherwise be drawn that those provisions imported something more than a mere right of occupancy is dispelled by the further provision that "should any of the Indians to whom tracts shall be assigned, abandon them, the said Secretary may take such action in relation to the proper disposition thereof as in his judgment may be necessary and proper." While a title may pass by a treaty and neither an act of Congress nor a patent is essential to its vesting, yet an expression of an ultimate purpose to give a patent has been relied on as significant evidence of the intention in cases otherwise doubtful. But that evidence is lacking here. By the treaty of 1860 the title of the United States was neither added nor promised to be added in the future to the right secured by the assignments. On the other hand specific provision was made in the same treaty for the allotment to four chiefs and the interpreter of the Nation of certain quantities of land in the reservation to be selected by them, and as if to distinguish the title they were to have from the rights of the ordinary assignees it was provided they should "receive a patent in fee simple therefor from the President of the United States." The intention to vest in the chiefs and interpreter a right and title different from that assigned in severalty to the other members of the tribe is quite apparent. It was also provided by the treaty that the tracts assigned should not be alienable in fee, leased or otherwise disposed of except to the United States or to members of the Delaware tribe, and they were to be exempt from levy, taxation, sale or forfeiture until otherwise provided by Congress. We do not doubt that Congress could convert a tribal right of occupancy into an individual one with right of succession in the heirs and of transfer between the members of the tribe and yet withhold the title and the same power of dominion it possessed before the assignment in severalty; and we think that is what was done by the treaty of 1860. Though more uniform and equitable it was similar to the custom of individual occupancy without ownership which other Indian Nations had themselves established. Further evidence of this intention if found in the treaty of 1866 (14 Stat. 793) entered into as the result of an expression by the Delawares of a desire to remove to the Indian country between Kansas and Texas. This treaty contemplated the disposition of all of the lands of the Delawares in a body with an exception in favor of those who should elect to dissolve their relations with the tribe and become citizens of the United States. For those who desired to remain proceedings in court as in naturalization cases were prescribed and it was provided that "there shall be granted to each of the Delawares who have thus become citizens a patent in fee simple for the lands heretofore allotted to them." But before this treaty was entered into Congress had granted the right of way to the railroad company. By the terms of this treaty the improvements upon the lands to be sold were to be appraised and the value paid to the Indians to whom they

belonged respectively, but there was no such provision as to the proceeds of the lands nor other recognition of an individual title therein. The case here is clearly distinguishable from Jones v. Meehan, supra, and the other cases relied on. Congress could have prescribed condemnation proceedings for the acquisition of the right of way, as was the case in Cherokee Nation v. Kansas Railway Co., 135 U. S. 641, or, as was done here, it could grant the right of way by legislative act assuming for the Government the extinguishment of such Indian title as there was as well as the payment of compensation. The Supreme Court of Kansas in Grinter v. Railway Co. 23 Kas. 455 held that the individual Indians secured a mere right of occupancy under the treaty of 1860 and that in 1862 Congress had full power to grant the right of way across the lands so held. The power in Congress is clear. Railway v. Roberts, 152 U. S. 114, 116.

We are also of the opinion that Congress by sections 2 and 9 of the Act of July 1, 1862 (12 Stat. 489), granted the right of way in question 400 feet in width. The grant of the right of way in section 2, adopted for the Leavenworth, Pawnee and Western Railroad Company by section 9, applied to all public lands in respect of which Congress could so legislate. That the term public lands included those in the Delaware reservation is shown, we think, by the final clause of section 2 wherein the United States assumed the duty of extinguishing the Indian titles. The exceptions and reservations found in section 3 of the act related to the donation of lands in aid of the construction of the railroad and doubtless included Indian reservations like that of the Delawares. They are the customary exceptions and reservations in such cases but it is apparent they have no relation to the right of way granted by the second section. The application of them exclusively to the land grant indicates the intention of Congress to give a right of way across all lands without exception so far as it was within its power to do so. There are obvious reasons why the Government should have refrained from donating in aid of railroad enterprises specific lands within reservations previously set apart by treaty to Indian tribes, and yet, having the power, should have granted a right of way through them, taking upon itself the duty of adjusting claims for compensation. It is not to be supposed that Congress in prescribing a route for the construction of a railroad that would in all probability run through an Indian reservation intended that the railroad company should deal with individual Indians, to whom the right of occupancy had been assigned in severalty, in securing the necessary right of way, especially when the Indians were still in a state of pupilage and the Government as their guardian still retained the title and dominion over the lands set apart for their use. There were no provisions in the Act of 1862 conferring upon the railroad company the power of eminent domain and those of the later act of July 2, 1864 (13 Stat. 356), were intended to apply not to lands like those of the individual Delawares but to those held by persons whose rights and titles were ordinarily judicable in proceedings in courts of justice. That a right of way 400 feet in width across the lands in question was granted by the act of Congress was held in Grinter v. Railway, 23 Kas. 455, and was assumed with-

out dispute in Union Pacific Railway Company v. Kindred, 43 Kas. 134. It is shown by stipulation in the record before us that Mr. Justice Brewer, when United States Circuit Judge, referred to the Grinter case in an unpublished opinion (Union Pacific Railway Company v. Shannon) and said that as a member of the Supreme Court of Kansas he took part in the decision and had no reason to doubt its correctness.

It was conclusively determined by the act of Congress that a right of way four hundred feet in width was essential to the performance of the public duties assumed by the grantee upon its acceptance of the grant. No part of that right of way could be alienated without the consent of Congress nor lost by laches or acquiescence. Northern Pacific v. Smith, 171 U. S. 260; Northern Pacific v. Townsend, 190 U. S. 267; Northern Pacific v. Ely, 197 U. S. 1. It became in a sense a national public highway, and private encroachments upon it could be neither strengthened nor confirmed by lapse of time. Possession of portions thereof by individuals was not adverse in the sense that it might ripen into title, nor, however long it was permitted to continue, did it preclude the railroad company from performing its duty by asserting its right thereto whenever the necessity for the full use arose. That for a long time it maintained its right of way fences within the exterior limits of the strip gave the adjacent land owners nothing more than a permissive use of the unenclosed portions, and when it became inconsistent with the public use to which the right of way was dedicated by Congress the railroad company properly removed its fences and resumed possession. Under such circumstances it cannot be said when it applied to a court of equity to protect the right of way from continued encroachments that it came with unclean hands. The title of the railroad company, which is said to be that of a limited fee, Northern Pacific v. Townsend, *supra*, is not so dissimilar from an easement as to render inapplicable the remedy appropriate to the latter. Louisville and N. R. Co. v. Smith, 63 C. C. A. 1, 128 Fed. 1.

The decree is affirmed.

Filed February 12, 1909.

(*Decree.*)

And on the twelfth day of February, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

No. 2671.

L. P. KINDRED, C. L. KINDRED, S. D. KNIGHT, JESSE HANEY, Charles Taylor, Jerry H. Murphy, J. D. Waters, J. S. McDaniel*d*, John Zeigler, C. P. Bauer, Paul Lukam, George Vail, J. W. Smith, James Traut, R. M. Maxwell, A. A. Bowen, Charles Bergman, E. A. Rhea, H. W. Rhea, —— Aldridge, John Burns, B. Friedburg, John B. Rees, C. F. Barker, Thomas Warren, Mrs. L. S. Bowers, P. H. Kaughns, Charles Sandberg, Edwin Taylor, J. G. Grooves, Ray Heidman, E. B. Silver, H. E. Thompson, Joseph Haney, H. W. Rhea. Jr., J. M. Hooper, John Fore, Martin Kapp, Ida Harvey, —— Harvey, —— Kanopp, C. M. Miller, and —— Proudy, Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY.

Appeal from the Circuit Court of the United States for the District of Kansas.

FRIDAY, *February* 12, 1909.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Union Pacific Railroad Company have and recover against the appellants, L. P. Kindred and others, the sum of twenty dollars for its costs herein and have execution therefor.

February 12, 1909.

(*Petition for Appeal to Supreme Court U. S.*)

And on the twenty-second day of April, A. D. 1909, a petition for appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Judicial District.

No. 2671.

L. P. KINDRED et al., Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, Appellee.

Petition for Appeal.

The above named appellants, L. P. Kindred, et al., respectfully show that the above entitled cause is now pending in the United

States Circuit Court of Appeals for the Eighth Circuit, and that a judgment has therein been rendered on the 12th day of February, A. D. 1909, affirming the decree of the Circuit Court of the United States for the First Division of the district of Kansas, and that the matter in controversy in said suit exceeds two thousand dollars besides costs; that this is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellants pray that an appeal be allowed them in the above entitled cause directing the clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellants, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

EDWARD D. OSBORN,
A. M. HARVEY,
FRANK DOSTER,
Solicitors for Appellants.

(Endorsed:) No. 2671. In the United States Circuit Court of Appeals, Eighth Judicial Circuit. L. P. Kindred, et al., Appellants, vs. Union Pacific Railroad Company, Appellee. Petition for Appeal. Filed Apr. 22, 1909, John D. Jordan, Clerk. A. M. Harvey, Edward D. Osborn, Frank Doster, Solicitors for Appellants.

(*Assignment of Errors on Appeal to the Supreme Court U. S.*)

And on the twenty-second day of April, A. D. 1909, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Judicial Circuit.

No. 2671.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Assignment of Errors.

Comes now the appellants and each of them above named and make and file the following assignments of errors on which they will rely in the prosecution of their appeal in the above entitled cause:

First. The Circuit Court of Appeals erred in overruling the demurrer interposed by the appellants to the bill of complaint filed in this cause and in holding and deciding that the matters and things stated in said bill constituted grounds in equity for relief against said appellants or any of them.

Second. The Circuit Court of Appeals erred in overruling and denying the plea of the said appellants to the bill of complaint in said cause.

Third. The Circuit Court of Appeals erred in holding and deciding that the agreed statement of facts in said cause entered into and signed by the solicitors for said appellee and said appellants constituted proof of the allegations of the appellee's bill in said cause.

Fourth. The Circuit Court of Appeals erred in holding and deciding that the several treaties with the Delaware Nation of Indians; to wit, of date September 24th, 1829, May 5th, 1854, and May 30th, 1860, and the survey and assignment in severalty of the lands in controversy pursuant to said treaties did not take the said lands out of the classification of public lands, but that notwithstanding said treaties, survey and assignment the same remained public lands subject to disposition by Congress for railroad right-of-way purposes.

Fifth. The Circuit Court of Appeals erred in holding and deciding that Congress was vested with power to grant to the Leavenworth, Pawnee and Western Railroad Company a right-of-way over and across the lands in controversy, and that the act of Congress of July 1st, 1862, granting a right-of-way to said railroad Company was not as applied to said lands a taking of private property for public purposes and was not a deprivation of property without due process of law.

Sixth. The Circuit Court of Appeals erred in holding and deciding that the act of Congress of July 1st, 1862, granting a right-of-way to the Leavenworth, Pawnee and Western Railroad Company over the public lands did by its proper construction apply to the lands in controversy and vest in said railroad company a right-of-way over and across said lands.

Seventh. The Circuit Court of Appeals erred in holding and deciding that the act of Congress of July 2nd, 1864, according to its proper construction, and the acts of the Leavenworth, Pawnee and Western Railroad Company in receiving and accepting the benefits granted to it by said act of Congress did not conclusively preclude said company from claiming a right-of-way over and across the lands in controversy, and in holding that, notwithstanding said act of Congress, and said acts of said railroad company, said company did obtain a right-of-way four hundred feet wide over and across said lands.

Eighth. The Circuit Court of Appeals erred in affirming the final order and decree of the Circuit Court perpetually enjoining the appellants from the doing of the acts complained of in appellee's bill.

Ninth. The Circuit Court of Appeals erred in rendering and entering its final decree in said cause on the pleadings and proof therein in favor of appellee and in decreeing to said appellee the relief prayed for in its bill.

Wherefore, in order that the foregoing assignment of errors may be and appear of record the appellants herein present the same to the court and pray that disposition be made thereof in accordance with the law and statutes of the United States in such cases, and that a

reversal may be had of the orders and final decree made and entered by said court.

EDWARD D. OSBORN,
A. M. HARVEY,
FRANK DOSTER,
Solicitors for Appellants.

(Endorsed:) No. 2671. In the United States Circuit Court of Appeals, Eighth Judicial District. L. P. Kindred, et al., Appellants, vs. Union Pacific Railroad Company, Appellee. Assignment of Errors. Filed Apr. 22, 1909, John D. Jordan, Clerk. A. M. Harvey, Edward D. Osborn, Frank Doster, Solicitors for Appellants.

(*Bond on Appeal to Supreme Court U. S.*)

And on the twenty-second day of April, A. D. 1909, a bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Judicial District.

No. 2671.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Bond on Appeal.

Know All Men by these Presents: That we, L. P. Kindred, et al., of the county of Leavenworth, state of Kansas, and the American Bonding Company of Baltimore, are held and firmly bound unto the Union Pacific Railroad Company in the sum of One Thousand ($1,000) Dollars, to be paid to the said Union Pacific Railroad Company; we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of April, A. D. 1909.

Whereas the appellants in the above entitled suit have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Eighth Circuit on the 12th day of February, 1909.

Now Therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

L. P. KINDRED.
[SEAL.] AMERICAN BONDING COMPANY OF BALTIMORE,
By JOHN V. ABRAHAMS,
Its Attorney-in-Fact for Kansas.

The foregoing bond is approved this 20th day of April, A. D. 1909.

WILLIAM C. HOOK,
United States Circuit Judge, Eighth Circuit.

STATE OF KANSAS,
County of Shawnee, ss:

On this 17th day of April, A. D. 1909, before me, the subscriber, a Notary Public in and for the County of Shawnee, and State of Kansas, came John V. Abrahams, Attorney in Fact for the American Bonding Company of Baltimore, in the State of Kansas, to me personally known to be the individual described in and who executed the within instrument, and he duly acknowledged the execution of the same, and by me being duly sworn, for himself deposeth and saith that he is the said Attorney in Fact of the Company as aforesaid, and that the seal affixed to the within instrument is the corporate seal of said company, and that the corporate seal and his signature as such Attorney in Fact were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year last above written.

[SEAL.] J. NEWELL ABRAHAMS,
Notary Public.

My Commission expires July 7, 1912.

(Endorsed:) No. 2671. In the United States Circuit Court of Appeals, Eighth Judicial Circuit. L. P. Kindred, et al., Appellants, vs. Union Pacific Railroad Company, Appellee. Bond on Appeal. Filed Apr. 22, 1909, John D. Jordan, Clerk.

(Order Allowing Appeal to Supreme Court of the United States.)

And on the twenty-second day of April, A. D. 1909, an order allowing an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Judicial Circuit.

No. 2671.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Order Allowing Appeal.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

WILLIAM C. HOOK,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) No. 2671. In the United States Circuit Court of Appeals, Eighth Judicial Circuit. L. P. Kindred, et al., Appellants, vs. Union Pacific Railroad Company, Appellee. Order Allowing Appeal. Filed Apr. 22, 1909, John D. Jordan, Clerk.

(*Citation.*)

And on the twenty-second day of April, A. D. 1909, a citation on the appeal to the Supreme Court of the United States was filed in said cause, the original of which, with acknowledgment of service endorsed thereon, is hereto attached and herewith returned:

The United States Circuit Court of Appeals, Eighth Circuit.

L. P. KINDRED et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Citation.

UNITED STATES OF AMERICA,
Eighth Circuit:

To the Union Pacific Railroad Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein L. P. Kindred, et al., are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William C. Hook, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 20th day of April, A. D. 1909.

WILLIAM C. HOOK,
Judge of the United States Court of Appeals, Eighth Circuit.

Service of the citation is acknowledged this 21st day of April, A. D. 1909.

R. W. BLAIR,
H. A. SCANDRETT,
B. W. SCANDRETT,
Solicitors for the Union Pacific Railroad Company, Appellee.

[Endorsed:] No. 2671. The United States Circuit Court of Appeals, Eighth Circuit. L. P. Kindred, et al., Appellants, vs. Union

Pacific Railroad Company, Appellee. Citation. Filed Apr. 22, 1909, John D. Jordan, Clerk. A. M. Harvey, Edward D. Osborn, & Frank Doster, Solicitors for Appellants.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing eighty-two pages contain a true copy of the portions of the transcript of the record printed pursuant to the stipulation of counsel for the respective parties and upon which record said cause was heard and full, true and complete copies of all proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause in said Court wherein L. P. Kindred, et al., were Appellants, and the Union Pacific Railroad Company was Appellee, No. 2671, as the same remain on file and of record in my office.

I do further certify that the original citation, with acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighth day of May, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 21,679. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 223. L. P. Kindred et al., appellants, vs. Union Pacific Railroad Company. Filed May 15th, 1909. File No. 21,679.

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No. 51

In the United States Supreme Court

L. P. KINDRED ET AL, *Appellants,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Appellee.*

Appeal from the United States Circuit Court of Appeals.

BRIEF OF APPELLANTS.

A. M. HARVEY,
EDWARD D. OSBORN,
FRANK DOSTER,
Solicitors for Appellants.

Smith-Grieves Typesetting Co., 714-716 Baltimore, Kansas City, Missouri.

In the United States Supreme Court

No. ——

L. P. KINDRED ET AL, *Appellants,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Appellee.*

Appeal from the United States Circuit Court of Appeals.

BRIEF OF APPELLANTS.

The appellee claims a right-of-way four hundred feet wide along its line in Wyandotte and Leavenworth Counties, in the State of Kansas, under the Act of Congress of July 1, 1862, and brought this suit in the Circuit Court for the District of Kansas to enjoin the appellants from trespassing upon or interfering with appellee's use of certain portions of this right-of-way claimed by it.

The lands to which the suit relates were, at the time the grant was made, part of the Delaware Diminished Indian Reservation, established by the treaties of September 24, 1829,

May 5, 1854, and May 30, 1860, and had, under the last treaty named, been allotted in severalty to the members of the tribe. (Record 33, 34.) Through these lands the grantee Railroad Company took possession of and fenced in, and have occupied undisturbed for over forty years, a right-of-way strip one hundred feet wide, except in a few places where more was taken for station purposes. (Record 36.) Upon none of this land have the appellants in any way trespassed or interfered, and no question arises regarding the title of the Company thereto, however acquired. (Record 36.) But in March, 1905, the appellee, desiring to make changes in its tracks, removed its right-of-way fences and forcibly took possession of certain tracts of land outside the right-of-way strip which theretofore it had occupied and used, claiming that such tracts, being within two hundred feet of its track, had been granted to it by the Act of July 1, 1862. (Record 36, 37.) All these lands had, however, from the time when the road was constructed, been in the actual possession of the appellants and their grantors, and used and cultivated by them. (Record 36.) This suit was commenced a few days thereafter.

The cause was heard upon an agreed statement of facts (Record 31), and the court rendered a decree for a permanent injunction. From that decree the defendants below appealed to the Circuit Court of Appeals. The cause was duly heard by that court and on February 12, 1909, the court rendered a decree affirming the decree of the Circuit Court, with costs, from which this appeal was duly taken and filed.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in the following particulars:

1. In holding and deciding that the several treaties with the Delaware Nation of Indians, to-wit, of date September 24th, 1829, May 5th, 1854, and May 30th, 1860, and the allotment in severalty of the lands in controversy pursuant to said treaties did not confer vested rights therein upon the allottees, but that notwithstanding said treaties and allotments the lands remained subject to the disposition of Congress for railroad right-of-way purposes.

2. In holding and deciding that Act of Congress of July 1st, 1862, granting a right-of-way to the Leavenworth, Pawnee & Western Railroad Company over the public lands did by its proper construction apply to the lands in controversy and vest in said Railroad Company a right-of-way over and across said lands.

3. In holding and deciding that the Act of Congress of July 2d, 1864, according to its proper construction, and the acts of the Leavenworth, Pawnee & Western Railroad Company and its successors in receiving and accepting the benefits granted to it by said Act of Congress did not conclusively preclude said company from claiming a right-of-way over and across the lands in controversy under the Act of Congress of July 1st, 1862.

4. In affirming the final order and decree of the Circuit Court perpetually enjoining the appellants from doing the acts complained of in appellee's bill.

ARGUMENT.

The decision of the Circuit Court of Appeals rests upon three points:

(1) That Congress had power on July 1, 1862, to grant to the Leavenworth, Pawnee & Western Railroad Company a right-of-way four hundred feet wide through the lands in question.

(2) That by the Act of July 1, 1862, according to its proper construction, Congress did grant such a right-of-way to that corporation.

(3) That the appellants obtained no title as against the appellee by adverse possession.

This last point was conceded by all parties.

In the Circuit Court of Appeals the appellee filed a brief stating its contention upon the points involved in this case and cited authorities to support its position. Inasmuch as the appellee will probably rely upon the same contentions and authorities in this Court, we shall by way of anticipation, in the present brief, occasionally refer to the arguments made and the cases cited by the appellee in the brief above referred to.

Epitome of Treaties and Statutes.

By the treaty of 1829 a large extent of territory lying north of the Kansas river and west of the Missouri river was set apart for the use of the Delaware Nation of Indians. In 1854 the Indians ceded to the United States, to be sold for their benefit, all this land except the portion described in the agreed statement of facts as the Delaware Diminished reservation (Record 33), which excepted portion was set apart for

"their permanent home." By a treaty of 1860 this diminished reservation was confirmed, provision was made for the making of separate allotments to every member of the tribe, "for the exclusive use and benefit of" the allottees.

The allotments provided for in this treaty were duly made before the enactment of the Land Grant Act of July 1, 1862, and all the lands now in dispute were comprised within such allotments. (Record 34.)

By the Act of Congress of July 1, 1862, the Union Pacific Railroad Company was incorporated and a right-of-way granted to it. By Section 9 of this Act, the Leavenworth, Pawnee & Western Railroad Company was given authority to construct a line from the mouth of the Kansas river westward to the one hundredth meridian upon the same terms and conditions as provided by the Act in relation to the Union Pacific.

Negotiations having arisen looking toward the removal of the Delaware Indians to another locality, a treaty was made with the tribe in 1866, wherein the Secretary of the Interior was authorized to sell to the Missouri River Railroad Company, or others, on behalf of the Indians, all the unsold part of their lands in Kansas, whether separate allotments or otherwise. The appellants hold the lands in dispute in this cause through mesne conveyances, under the sales and patents thereof made by authority of this treaty; and their title is not questioned, unless the Leavenworth, Pawnee & Western Railroad Company had previously under said Act of Congress of July 1, 1862, obtained title thereto. (Record 34.)

The appellee's claim to a right-of-way four hundred feet in width rests entirely upon the Act of Congress of July 1, 1862. In determining the effect of the Act two questions arise:

(1) Did Congress have power to grant a right-of-way through the lands in question?

(2) Assuming that Congress had such power, did the Act of July 1, 1862, grant such a right-of-way?

The first question is one of the constitutional power of Congress. The second is one of construction of the Act.

I.

Congress had no Power to Grant a Right of Way Through the Lands in Question.

The assertion thus made requires an examination of the several treaties with the Delaware Nation of Indians and an ascertainment of the rights secured to the nation thereunder.

In 1829 a treaty was concluded with the nation which was proclaimed March 24. 1831. (7 Stat. 357.) The material provisions of this treaty were as follows:

> "It is hereby agreed upon by the parties that the country in the fork of the Kansas and Missouri rivers, extending up the Kansas river to the Kansas line, and up the Missouri river to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide, north of the Kansas boundary line, for an outlet, shall be conveyed and forever secured by the United States, to the said Delaware Nation, as their permanent residence; and the United States hereby pledges the faith of the Government to guarantee to the said Delaware Nation forever the quiet and peaceable possession and undisturbed enjoyment of the same, against the claims and assaults of all and every other people whatsoever.'

The above constituted a conveyance of land to the Delaware Indians for the purpose of their permanent residence, and in addition it contained a solemn pledge to them that they should be forever secured in the quiet possession and undisputed enjoyment of their land against the claims and assaults of all persons whatsoever.

In 1854 a second treaty was concluded with the Delaware Nation (10 Stat. 1048). By Article 1 of this Treaty the Delawares retroceded certain portions of the tracts described in the Treaty of 1829, reserving, however, a tract which is inclusive of the lands in question in this case. By Articles 2 and 3 the United States agreed to pay the Delawares $10,000.00 for that portion of the tract described in the Treaty of 1829 as the "outlet," and also agreed to have the retroceded country, excepting the "outlet," surveyed and sold as public land and the proceeds paid to the tribe. Article 4 provided for a cash payment of $140,000.00 to the tribe in lieu of certain outstanding annuities. Article 5 provided that a school fund of $46,080.00 should be maintained, for the present, at 5 per cent interest. By Article 6 $10.000.00 in annuities were made payable to certain chiefs. By Article 7 the money derived from the sale of the retroceded country not needed for immediate use was to be invested in stocks, the principal to remain unimpaired, the interest to be applied for the benefit of the tribe. By Article 7 the President was authorized to invest the funds of the tribe pending the enactment by Congress of legislation respecting thereto. Articles 11 and 12 read as follows:

> "Article XI. At any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country here is, and may assign such portion to each person or family as shall be designated by the principal men of the tribe, provided such assignment shall be uniform.
>
> Article XII. In the settlement of the country adjacent to the Delaware reservation, roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law shall have a right-of-way through the reserved lands, on the same terms that the law provides for their location through the lands

> of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have the right-of-way, on payment of a just compensation therefor in money."

It will be observed that by the above treaty provisions the preservation of the lands included within the diminished reservation, for the purpose of a permanent home for the Delaware Nation, was restated, and the obligation cast on the President, whenever request therefor should be made, to cause the lands to be surveyed and to make assignments in severalty of the surveyed tracts to such persons or families as might be designated by the principal men of the tribe. It will be also observed, as a further evidence of the intention of the Delawares to maintain the diminished tracts of land as their permanent home and to acquire the conveniences and practice the arts of civilized life, that a reservation was made of rights-of-way for roads and highways laid out by authority of law, and a like reservation was made in favor of railroad companies whose lines of road might pass over the lands, the latter, however, conditioned on payment of a just compensation therefor in money.

The foregoing treaty was followed by another one of 1860. (12 Stat. 1129.) We copy all the material provisions of this treaty. As will be perceived, its design was to give detailed effect to the Treaty of 1854 by providing for the survey of a portion of the lands and their assignment in severalty to the different members of the tribe, and for the sale of such portion as might not be required for separate homes in severalty.

> "Article 1. By the first article of the treaty made and concluded at the city of Washington, on the sixth day of May, one thousand eight hundred and fifty-four, between George W. Manypenny, commissioner on the part of the United States, and certain delegates of the Delaware tribe of Indians, which treaty was ratified by the

Senate of the United States on the eleventh day of July, one thousand eight hundred and fifty-four, there was reserved, as a permanent home for the said tribe, that part of their country lying east and south of a line beginning at a point on the line between the Delawares and half-breed Kansas, forty miles in a direct line west of the boundary between the Delawares and Wyandottes; thence north ten miles; thence in an easterly course to a point on the south bank of Big Island creek, which shall also be on the bank of the Missouri river, where the usual high water line of said creek intersects the high water line of said river. And by the eleventh article of said treaty it was stipulated that 'at any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe, provided such assignments shall be uniform.'

The Delawares having represented to the Government that it is their wish that a portion of the lands reserved for their home may be divided among them in the manner contemplated by the eleventh article of the treaty aforesaid, it is hereby agreed by the parties hereto that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner that the public lands are surveyed; and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable, a reasonable proportion of timber, to be selected according to the legal subdivisions of survey.

Article 2. The division and assignment in severalty among the Delawares of the land shall be made in a compact body, under the direction of the Secretary of the Interior, and his decision of all questions arising thereupon shall be final and conclusive.

Certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that the said tracts are set apart for the exclusive use and benefit of the assignees

and their heirs. And said tracts shall not be alienable in fee, lease, or otherwise disposed of, except to the United States or to members of the Delaware tribe, and under such rules and regulations as may be prescribed by the Secretary of the Interior; and said tracts shall be exempt from levy, taxation, sale, or forfeiture, until otherwise provided by Congress."

"Prior to the issue of the certificates aforesaid, the Secretary of the Interior shall make such rules and regulations as he may deem necessary and expedient respecting the disposition of any of said tracts, in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased persons. And should any of the Indians to whom tracts shall be assigned abandon them, the said Secretary may take such action in relation to the proper disposition thereof as in his judgment may be necessary and proper.

The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained.

Article 3. The Delaware tribe of Indians, entertaining the belief that the value of their lands will be enhanced by having a railroad passing through their present reservation, and being of the opinion that the Leavenworth, Pawnee & Western Railroad Company, incorporated by an Act of the Legislative Assembly of Kansas Territory, will have the advantage of travel and general transportation over every other company proposed to be formed which will run through their lands, have expressed a desire that the said Leavenworth, Pawnee & Western Railroad Company shall have the preference of purchasing the remainder of their lands after the tracts in severalty and those for the special objects herein named shall have been selected and set apart, upon the payment into the United States treasury, which payment shall be made within six months after the quantity shall have been ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, shall appraise to be the value of said land: Provided, in no event shall the value be placed below the sum of one dollar and twenty-five cents per acre, exclusive of the cost

of survey of the same. [And that the United States will issue a patent in fee simple to said company, upon the payment as aforesaid, for all their land remaining in Kansas.] It is therefore agreed by the United States that the wishes of the Delawares shall be granted; that they will accept of the trust reposed upon them; and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the seventh and eighth articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances. It is also agreed that the said railroad company shall have the perpetual right-of-way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad.

Article 4. Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the government of the lands reserved by the preceding articles, that until they return, the allotments set apart for them belong to the nation in common."

Article 5 reserved certain tracts from 40 to 320 acres in extent for church, school house and mill purposes with a provision for their sale for the benefit of the tribe when the purposes of the reservation should have been accomplished. Article 6 provided for the payment by the United States of $39,500.00 as indemnity for timber that had been cut from the reservation by the whites and for live stock that had been stolen by the whites, and it also provided for the rectification of a mistake that had been made against the Delawares in the area of land agreed to be conveyed by the treaty of 1829, and

a valuation of the lands mistakedly agreed to be conveyed and the payment by the United States of the amount of said valuation. Article 7 provided an allotment to the interpreter of the tribe and certain of the chiefs of tracts of 320 and 640 acres, to be conveyed to them by patent in fee simple. Articles 8, 9 and 10 we deem to be immaterial.

An amendment to Article 3 of the foregoing treaty was proposed by the Senate and accepted by the Delawares, reading as follows:

> "At the end of Article 3 add: It being the intent and meaning of the Delawares, in consenting to the sale of their surplus lands to said company, that they should, in good faith, and within a reasonable time, construct a railroad through their reservation, and to carry out this intent, as well as to secure so great a public convenience, it is agreed that no patent shall issue for any of these lands, nor shall the sale be binding upon the Delaware Indians nor the United States until the Secretary of the Interior shall be fully satisfied that a line of twenty-five miles of the road from Leavenworth City shall have been completed and equipped, when a patent shall issue for one-half of the ascertained quantity. The patent for the residue to issue only when the said Secretary shall be satisfied that the road has been in like manner completed and equipped to the western boundary of the Delaware reservation. And if the said company shall fail or neglect to construct either the first or second sections of the road, or having constructed the first section and fail to complete the second section within a reasonable time, they shall forfeit to the United States all right to the lands not previously patented, and the certificate of purchase shall be deemed and considered canceled. *And provided further*, that in case the said company shall fail to make payments for the lands, or fail to construct the road, as hereinbefore stipulated, within a reasonable time, the surplus lands shall be disposed of by the Secretary of the Interior at public auction, in quantities not exceeding one hundred and sixty acres; but in no case for a sum less than the appraised value, the net proceeds to be applied in the same manner as hereinbefore specified. *And provided further*, that the

said railroad company shall finally and in good faith sell and dispose of all lands within seven years after receiving the patent therefor, except what may be necessary for railroad purposes; and in default thereof, so much thereof as may remain undisposed of shall revert to the Delaware Nation, to be disposed of as is herein provided for other forfeited lands."

As has been observed, Article 1 of the foregoing treaty recited the treaty of 1854 in which it was stated that the lands had been *"reserved as a permanent home* for the said tribe," and in which it was further recited that by the eleventh article of the treaty of 1854 promise had been made to the Delawares that "the President may cause the country reserved for their *permanent home* to be surveyed in the same manner as the ceded country is surveyed, and may *assign such portion to each person or family* as shall be designated by the principal men of the tribe." Article 1 further recited that the Delawares had represented to the Government their wish that a portion of the lands *"reserved for their home"* might be divided among them in the manner contemplated by the treaty of 1854; wherefore, it was agreed that the reservation should be surveyed as early as practicable, "and to each member of the Delaware tribe there should be *assigned a tract of land* containing eighty acres, to include in every case, as far as practicable, a reasonable portion of timber." It has been also observed that by Article 2 it was provided that "certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, *and that the said tracts be set apart for the exclusive use and benefit of the assignees and their heirs.*" The above provision was followed by one restricting alienation of the lands except to the United States or to members of the Delaware tribe, and exempting them from tax levy, legal process or other character of forfeiture until Con-

gress should otherwise provide. It has been also observed that by Section 2 provision was made, under the rules of the Secretary of the Interior, for the disposition of any of the assigned tracts in case of the death of the allottee, to the end that they might be secured to the families of the deceased, and the Secretary was also empowered to make disposition of such tracts as after assignment might be abandoned. Improvements on the unassigned lands were to be sold for the benefit of the individual owners, the funds to be expended for them in improving the lands retained. It has been also observed that the contemplated Leavenworth, Pawnee & Western Railroad Company was regarded by the Delawares as an enterprise that would give enhanced value to their lands; wherefore, they expressed a desire that it should have the preference of purchasing those unassigned and unreserved lands which the treaty contemplated should be sold, in consideration of which desire the United States agreed to act as trustee for the sale of the lands and the custody and disposition of the money arising therefrom. It has been also observed that the aforenamed railroad company was granted a right-of-way over the lands allotted in severalty on the payment of compensation in money to the several allottees. Care must be taken to distinguish the right-of-way privilege thus granted by the treaty from the right-of-way privilege claimed by appellee as the successor of the Leavenworth, Pawnee & Western Railroad Company. The right-of-way granted by the treaty was not from the mouth of the Kaw river westward, the one claimed by appellee in this suit, but was a right-of-way from Leavenworth City westward, an entirely different route from the one now in question.

That the design of the foregoing treaty was to vest the individual Delawares with a property right in the lands allotted to them in severalty would seem to be without question. In

all the treaties mentioned the tract of country set apart to them was stated to be for purposes of their "permament home," and the earlier ones clearly contemplated a transmutation of the tribal right of occupancy into one of individual possession and seisin of defined tracts carved out of the communal domain. That contemplated design was accomplished by the Treaty of 1860. It provided for assignments in severalty "for the exclusive use and benefit of the assignees and their heirs." The quality of descendibility to successors was thus imparted to the land and by other clauses of the treaty provision was made for funds with which to erect improvements on the tracts assigned. There was, as in all land treaties with Indians, an understood, even if unexpressed, intent to educate the Indian into the habits of civilized life—individual ownership instead of communal occupancy—as a means to which end the tribal lands were to be partitioned in severalty, and an equitable title vested in the allottees and their heirs, to be controlled in trust for their benefit. It seems plain that a full equitable title to the allotted lands became vested in the individual Delawares. Every element of property right except the naked legal title was conferred upon them. The restriction on alienation was only partial. Alienation to other members of the tribe and to the United States was permitted—alienation to outsiders only forbidden. Had these partial restrictions on alienation not been inserted in the treaty a full legal title would have been vested in the individual Delawares. In *Jones* v. *Meehan*, 175 U. S. 1, 44 L. Ed. 49, it was held that the treaty-making power was competent to invest an Indian with the fee simple title to land; that a patent from the Executive Department was not necessary to pass the legal title, and that the phrase "set apart to" unaccompanied by words restrictive of alienation was sufficient to indicate an intent to vest a full legal title. This case we take to be the leading one

on the subject. It lays down rules for the interpretation of treaties with Indians and is replete with argumentative discussion and quotations from the earlier decisions. It contains so much that is applicable to the present controversy that we ask the Court's perusal of it throughout.

Jones v. *Meehan* was followed in *Francis* v. *Francis*, 203 U. S. 233, 51 L. Ed. 165, in which the same decision was made. In that case the granting clause of the treaty was, "There shall be reserved for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land."

These two cases seem to us conclusive on the propositions that the treaty-making power is competent to vest a legal title in severalty to Indian lands, and that in the lack of restrictions on alienation the phrases "set apart to," "reserved to," "assigned to," etc., sufficiently evidence an intent to pass a fee simple title.

We contend, however, that where a grant is made to one "and his heirs" a restriction on alienation either partial or entire does not debase the grant to a mere right of occupancy, but that a vested interest passes thereby under the cover and protection of the constitutional guaranties of property right. Cases which, although not entirely up to the mark of the present one in similarity of facts, are, nevertheless, clearly illustrative of the proposition, are *Libby* v. *Clark*, 118 U. S. 250, 30 L. Ed. 133, and *United States* v. *Paine Lumber Co.*, 206 U. S. 467, 51 L. Ed. 1139. In the former of these cases it appeared that the treaty with the Ottawa tribe of Indians "reserved and set apart" certain lands among the chiefs of the tribe with a provision for citizenship and the issuance of a patent at the end of five years, and with a restriction on alienation prior to citizenship. Among other things, the court said:

"The title conveyed to Hurr by the patent was a fee simple, that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a fee simple estate. 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.' 4 Comyn's Digest 1, article, Estates. The limitation of the power of sale for five years is not inconsistent with a fee simple estate. Such, also, seems to have been the practice of the Government in other treaties referred to by counsel in their brief. 7 Stat. at L., pp. 348 *et seq.*"

The latter case, *United States* v. *Paine Lumber Co.*, approaches more nearly to the facts of the present case. The treaty with the Stockbridge and Munsee Indians provided for a survey of the tribal lands and for an allotment among the individuals and families of the tribes. The allottees were authorized to take possession of their lands, the United States promising that until the issuing of patents it would hold the same in trust. Certificates were authorized to be issued "securing to the holders their possession and an ultimate title to the land," but reciting that "such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder." It was further provided that after ten years on the application of the certificate holder and the consent of the tribal council, and conditioned upon it appearing prudent to the President and for the welfare of the individual, the restriction on alienation might be removed and a patent issued. It was further provided that on the death of an allottee without heirs his allotment should revert to the tribe for disposition by the tribal council, and it was expressly declared that inasmuch as the object of the treaty was to advance the welfare and improvement of the Indians if it should thereafter prove insufficient to accomplish those ends the Presi-

dent and the Senate might adopt a different policy in the management of their affairs, or Congress might make different provisions of law looking to those ends.

The question which arose on the treaty was whether, the fee of the lands being held in abeyance in the United States, an allottee might cut and remove timber for purposes other than the improvement of the allotted tract. The contention for the Government was that the title of the allottees was one of mere occupancy and, hence, that the right to the fee of the timber did not exist in the allottees. The court, however, said:

> "If such were the title in the case at bar, such would be the conclusions. But such is not the title. We need not, however, exactly define it. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Libby* v. *Clark*, 118 U. S. 250, 30 L. Ed. 133, 6 Sup. Ct. Rep. 1045. The title is held by the United States, it is true, but it is held 'in trust for individuals and their heirs to whom the same were allotted.'"

We admit the difficulty in this and other like cases of defining with exactness the character of estate held by Indian allottees. The most that can be done is to define it as a vested property right. It is easy, however, to perceive what it is not. It is not that limited and precarious character of interest which appellee contends for. It is not a tenancy by sufferance or at will. It is not a continuation of that mere right of occupancy hitherto possessed under tribal conditions. It is a right of individual possession of a separable defined tract of land, drawing to itself all the incidents of personal dominion and continuable in the allottee and his heirs forever, unless, under the provisions of some new convention or treaty, voluntarily surrendered.

The allotment of lands in severalty to the members of an Indian tribe vests them with a present equitable title and contemplates an ultimate legal title. That, as to the treaty with the Stockbridge and Munsee Indians, was distinctly ruled by the Circuit Court in *United States* v. *The Paine Lumber Co.*, 154 Fed. 263, the opinion in which, when the case reached the Supreme Court on error, was stated to have been rendered with "such circumstantial care and consideration that makes unnecessary an elaborate discussion by us."

In *United States* v. *Cook*, 86 U. S. (19 Wall.) 591, 22 L. Ed. 210, the court likened an Indian right of occupancy in severalty to a tenancy for life. In that case the Indian right was one of mere occupancy in severalty, the fee remaining in the United States without any promise of present or ultimate patent, conditional or otherwise. The question of the Indian's right to sever and sell timber arose. The court held that the right did not exist because of the character of the Indian's occupancy as tenant for life, saying, among other things:

> "These are familiar principles in this country and well settled, as applicable to tenants for life and remainder-men. But a tenant for life has all the rights of occupancy in the lands of a remainder-man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more."

In the case of *Shiver* v. *United States*, 159 U. S. 491, 40 L. Ed. 231, the principle on which *United States* v. *Cook*, *supra*, was decided was applied to the case of a homestead settler, the court holding against his right to utilize the growing timber on the homestead for other purposes than the improvement of the land, but, citing to *United States* v. *Cook*, likened a homestead settlement right as it had an Indian allotment right to the case of a tenancy for life.

Coming now to the application of all the foregoing cases to the controversy here involved, if it be that an Indian allottee's interest in the land be a vested property right it follows that Congress is lacking the power to make a grant through it of a railroad right-of-way without making provision for compensation therefor. Making reference again to the case of *Jones* v. *Meehan*, 175 U. S. 1, it was ruled in the syllabus that:

> "The right of lessees of the heir of an Indian to whom title to land was granted by an Indian treaty cannot be divested by any subsequent action of the lessor, or of Congress, or of the Executive Department."

In the closing paragraph of the opinion, citing to cases, it was declared that:

> "The construction of treaties is the peculiar province of the Judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."

Specific application of the law thus declared was made in a railroad right-of-way case. *Cherokee Nation* v. *Southern Kansas R. R. Co.*, 135 U. S. 641, 34 L. Ed. 295. In that case it was held that the Cherokee Nation had a property interest in its tribal lands of which, although subject to the power of eminent domain, it could not be divested for railroad right-of-way purposes except on payment of full compensation as required by the last clause of the Fifth Amendment to the Constitution. Our contention, therefore, is that the fact of property interest in the Delaware allottees and the rule of constitutional protection declared in *Jones* v. *Meehan*, *supra*, and *Cherokee Nation* v. *Southern Kansas Ry. Co.*, *supra*, put the lands in question beyond the power of Congressional invasion by the Act of 1862 under which the appellee claims.

Even if Congress in the Act of 1862 had used apt words to evince an intent to pass a right-of-way easement in the severalty lands of the Delaware Indians its purpose would have failed because of the insuperable bar of the Constitution. But, using only the descriptive phrase "public lands," appellee's claim is not even within the words of the grant on which it relies. It got no right-of-way of any width at all by that Act. It has, however, by the building and operation of its line of road acquired by prescription a right-of-way easement of the width actually occupied by it, to-wit, one hundred feet, but no more.

II.

The Act Does Not Purport or Intend to Grant a Right-of-Way Through the Lands in Question.

It should be noted, in entering upon the consideration of the construction and effect of this statute, that it contains no specific grant of a right-of-way to the Leavenworth, Pawnee & Western Railroad Company, nor any specific grant to any person or corporation applicable to the territory in which lay the Delaware Indian lands. The sole specific grant is made in terms to the Union Pacific Railroad Company, and covers a wholly distinct territory. In a subsequent section of the statute Congress authorizes another corporation, the Leavenworth, Pawnee & Western Railroad Company of Kansas, to construct a railroad and telegraph line "upon the same terms and conditions in all respects as are provided in this Act for the construction of the railroad and telegraph line first mentioned."

At the outset and as a thing most important to observe in the consideration of this topic, it should be recalled that in 1854 the United States, by an equitable arrangement with the Indians, had secured for all railroads whose lines should pass

through the diminished reservation the privilege of obtaining a right-of-way through the reservation by purchase from the Indians, and that in 1860 a similar privilege was obtained specifically for the Leavenworth, Pawnee & Western Railroad Company to purchase a right-of-way for their then intended line from Leavenworth, and that in all other respects the United States had guaranteed to the Indians the perpetual enjoyment of their lands. Can it be assumed, from mere general language, that only a few years later Congress arbitrarily took from them a portion of their lands and gave them gratuitously to the Railroad Company, for whose benefit the right to purchase them at a just price had but lately been secured? So far from there being any necessity for such a construction, every probability is against it.

The Act of Congress grants a right-of-way "through the public lands." At the time of its enactment the lands involved in this case were not merely lands conceded and guaranteed to the Indians as a perpetual home by express treaty, but they had but a few months before been allotted in severalty to the individual members of the tribe for their sole and exclusive use, under the provisions of a treaty made by the United States with the Indians only two years prior to the date of the Act. (R. 33-34, 43.) Under these circumstances, did the Act of July 1, 1862, purporting only to grant a right-of-way "through the public lands," operate arbitrarily to take away from the Indian allottees the lands which had just been solemnly guaranteed and allotted to them for their exclusive use?

The question here is not, "Could Congress grant the right-of-way over these lands?" but "Did Congress do so?" Power to dispose and intent to dispose are entirely distinct. What did Congress mean by "public lands" as used in the grant? All lands over which Congress had power of disposition, however they might already have been reserved for or appropriated

to other uses and purposes by the Government? Or such parts of the public domain as were still unappropriated. The latter sense would certainly be the more likely.

It has long been a settled principle of construction that congressional grants of land are not to be regarded as including lands which have been reserved or appropriated by the United States for any purpose whatever, even though they be not expressly excepted by the language of the grant.

> *L. L. & G. R. Co.* v. *U. S.*, 92 U. S. 733.
> *M., K. & T. Ry. Co.* v. *U. S.*, 92 U. S. 760.
> *Beecher* v. *Wetherly*, 95 U. S. 717.
> *Spokane Falls & N. Ry. Co.* v. *Ziegler*, 61 Fed. 392.
> *U. S.* v. *Sioux City & St. P. Ry. Co.*, 46 Fed. 502.

> "Many authorities might be cited to the proposition that a prior appropriation is always understood to except land from the scope of a subsequent grant, although no reference is made in the latter to the former."
>
> *Scott* v. *Carew*, 196 U. S. 100.

It follows that grants of lands or rights out of the "public lands" are to be construed as excluding lands otherwise reserved or appropriated, unless a contrary intent is clearly and positively expressed.

In *Wilcox* v. *Jackson*, 13 Pet. 498, the leading early case upon this point, the court said:

> "But we go further and say that whensoever a tract of land shall have been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law or proclamation, or sale, would be construed to embrace it or to operate upon it, although no reservation was made of it." (Page 513.)

Speaking of the use of land for a military post:

> "Now this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use." (Page 512.)

In *Bardon* v. *Northern Pacific R. Co.*, 145 U. S. 535, the court affirmed the rule declared in the earlier decisions that in the absence of any express provisions to the contrary a grant of public lands to a railroad company applies only to lands which are free from existing claims or reservations. Mr. Justice Field, who had dissented in the case of *Leavenworth, Lawrence & Galveston R. Co.* v. *U. S.*, now referred with approval to the doctrine of the earlier case that the Indians' right of occupancy.

> "with the correlative obligation of the Government to enforce it, negatived the idea that Congress, *even in the absence of any positive stipulation to protect the Osages*, intended to grant their land to a railroad company, either absolutely or *cum onere*."

In *Northern Lumber Co.* v. *O'Brien*, 71 C. C. A. 598, 139 Fed. 614, the Court of Appeals, Eighth Circuit, holding that the Northern Pacific grant of July 2, 1864, did not apply to lands which had been withdrawn by the Interior Department from preëmption, settlement and sale, said:

> "The words 'public land' have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. * * * In short, the subsequent grant, being *in praesenti* and confined to public land, did not embrace the land now in controversy, because it was then excluded from the category of public land by reason of the subsisting withdrawal or reservation."

That case was affirmed on appeal (*Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190). Mr. Justice Harlan, in delivering the opinion of the Court, reviewed the earlier decisions and reached the conclusion, which he regarded as definitely settled, that

> "no lands passed that were not, at the date of the grant, public land; that is, lands 'open to sale or other disposition under general laws.'"

This criterion of the meaning of the words "public lands" in a congressional land grant has been frequently applied as the correct test by this Court. And according to that test, the lands in question in this suit were not "public lands," for they were not "open to sale or other disposition under general laws" at the time the grant was made.

This presumptive rule of construction is logical. It cannot be assumed that, in providing for the use of public land for one purpose, Congress intended to override and revoke existing appropriations and reservations for other public purposes, when the language of the grant does not require any such assumption. If Congress intended to revoke or destroy existing government reservations, it would clearly express such intent in plain and unmistakable language.

It necessarily follows from the doctrines above stated that a congressional grant of, or out of, public land does not cover land reserved to the Indians, unless such land is expressly specified. The Indians are recognized as possessing a certain claim to and right in the land, and the land is regarded as reserved or appropriated by the United States for a special purpose. The rule is not merely that the rights of the Indians are preserved in such cases, *but that the grant does not include the lands in question at all, and does not even pass to the grantee a right subject to the Indian title and rights.* There is always a strong presumption against the exercise of the congressional

power to grant Indian lands, and the language of a grant is not to be construed as constituting an exercise thereof unless the words undoubtedly express that intent. The lands in controversy in this suit formed part of an existing Indian reservation, and in accordance with the settled rule of construction, were not covered by the right-of-way grant to the Leavenworth, Pawnee & Western Railroad.

This conclusion, indeed, is necessary also from another point of view. To give the Act of July 1, 1862, the effect contended for by the appellee is to abrogate the treaty of 1860 with the Delaware Nation. A treaty of the United States, whether made with a foreign nation or with an Indian tribe, has the force of law equally with an Act of Congress. Congress may abrogate such treaties, as it may repeal statutes, but in neither case is repeal or abrogation by implication favored. Unless the intent of Congress to abrogate the treaty is clear and undoubted from the language of the Act, unless it admits of no other reasonable construction, it will not be construed as abrogating the treaty.

Chew Heong v. *U. S.*, 112 U. S. 536.
U. S. v. *Gue Sim*, 176 U. S. 459.
Ward v. *Race Horse*, 163 U. S. 459.
Cope v. *Cope*, 137 U. S. 682.
Turner v. *American Baptist Missionary Union*, 5 McLean 349.

The courts of the United States have uniformly held that grants of public lands to railways do not apply to Indian reservations, even though such reservations be not expressly excepted from the grant.

This question was fully considered in *L. L. & G. R. Co.* v. *U. S.*, 92 U. S. 733, where the court held, of a grant of alternate sections out of the public lands, that it did not embrace those lands "which the Indians, pursuant to treaty stipulations,

were left free to occupy." In considering this case, upon the assumption that the grant contained no express exceptions which would cover Indian lands, the court said:

> "As the attempted transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it."
>
> "In an Indian reservation other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose."

This rule was referred to with approval by the court in *Bardon* v. *Northern Pacific R. Co.*, 145 U. S. 535, and *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190.

In *Minnesota* v. *Hitchcock*, 185 U. S. 373, the Supreme Court, discussing the case on the assumption that there was no express exception, held that a grant to a State of all sections 16 and 36 in the public lands within the State did not include lands within the limits of an Indian reservation. In *A. & P. R. Co.* v. *Mingus*, 165 U. S. 413, it was held that lands within an Indian reservation are to be regarded as lands reserved by the Government for a particular use and purpose.

The following cases are to the same effect:

King v. *McAndrews*, 111 Fed. 860.
U. S. v. *Oregon Central Military Road Co.*, 103 Fed. 549, 554.
Northern Pac. R. Co. v. *Maclay*, 61 Fed. 554.

M., K. & T. Ry. Co. v. *Roberts*, 152 U. S. 114, is not in conflict with this doctrine.

There was in that case an *express application* of the grant to the Indian reservations. In granting alternate sections of public land to the railroad company, the Act of July 26, 1866,

excepted from the grant any and all lands reserved to the United States in any manner by competent authority for any purpose. This clearly amounted to an express reference, *inter alia*, to Indian reservations. *Then the Act goes on to grant through these reserved lands a right-of-way.* That case, indeed, expressly recognizes and confirms the rule stated in the decisions we have referred to above. The court holds that a grant to the State of Kansas of every section 16 and 36 does not embrace lands which had been set apart by treaty as a reservation for the use of the Indians, and *L. L. & G. R. Co.* v. *U. S.* and *Wilcox* v. *Jackson* are cited with approval.

The Contention That This Rule of Construction Does Not Apply to Right-of-Way Grants.

The attempt was made in the Appellee's Briefs in the lower courts to avoid the effect of these decisions and of the doctrines which they establish, by suggesting a distinction in this respect between right-of-way grants and grants of land in aid of construction.

The contention, however, cannot be supported upon either principle or authority. The many statements of the rule of construction in the decisions contain no intimation of any such distinction. They apply in terms to all grants of rights in public lands. Every reason for the existence of the rule—the settled meaning of the words "public lands," the presumption that what has been expressly set aside for one purpose is not by mere implication to be devoted to some wholly different end, the great reluctance to assume that Congress intended to violate solemn treaty obligations in the absence of a clear indication of such intent—all these apply fully as well to right-of-way grants as to grants of other natures. If the grant of a right-of-way through the "public lands" is to

be construed as including lands that have been appropriated for other purposes, it will obviously extend to all kinds of Government reservations and will apply to lands upon which inchoate pre-emption claims have attached. But it will hardly be seriously contended that such grants convey rights-of-way through the military reservations of the United States or through lands to which pre-emption claims have attached—and yet, to that result the contention of the appellee inevitably leads.

That the settled rule of construction does apply to right-of-way grants as well as to grants of land in aid of construction is conclusively established by the decisions of this Court. In *Washington & I. R. Co.* v. *Osborn*, 160 U. S. 103, the question arose whether under the right-of-way Act of March 3, 1875, the railroad company obtained a right-of-way through land upon which Osborn had previously settled intending to pre-empt it. The statute granted rights-of-way through the "public lands," and expressly excepted from its operation "military parks, Indian reservations, or other lands specially reserved from sale," within which exception the lands claimed by Osborn did not fall. Notwithstanding this, and the further fact that Congress had admitted power to dispose of the lands in question, it was held that no right-of-way was granted through it—a clear application of the usual rule of construction to right-of-way grants.

In *Union Pacific R. Co.* v. *Harris*, 215 U. S. 386, it was held that under the Act of July 1, 1862, and the Act of July 3, 1866, which merely permitted a change of route, the Leavenworth, Pawnee & Western Railroad Company did not obtain a right-of-way through land upon which one had settled for the purpose of pre-emption, though it was conceded that Congress had the power to dispose of it. The court applied the settled rule of construction to the right-of-way grant in the following words:

> "The grant of the right-of-way was 'through the public lands.' What is meant by 'public lands' is well settled. As stated in *Newhall* v. *Sanger*, 92 U. S. 761, 763, 23 L. Ed. 769, 770: 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' "

In the decision of the same case in the Supreme Court of Kansas, whose judgment was affirmed by this Court, the same principles of law were declared.

Railroad Co. v. *Harris*, 76 Kan. 255.

The authorities which were relied upon by appellee in the Circuit Court of Appeals to support its contention that a different rule of construction is applicable to right-of-way grants, do not support it. *Railroad Co.* v. *Jones*, 177 U. S. 125; *Railroad Co.* v. *Baldwin*, 103 U. S. 426; *Bybee* v. *Oregon & C. Ry. Co.*, 139 U. S. 679, and *Bybee* v. *Oregon & C. Ry. Co.*, 26 Fed. 586, merely decide that a right-of-way grant operates *in praesenti* and is not, like the ordinary grant of alternate sections, postponed until the definite location of the road, and that it prevails over claims originating subsequent to the grant, but before definite location of the line. There is no intimation in these cases that a right-of-way grant is not subject to the established rule of construction excepting from its operation lands previously reserved for other purposes. Indeed, in *Railroad Co.* v. *Baldwin*, *supra*, the court show that in this respect there is no difference between right-of-way grants and grants in aid of construction, when they say that the proper rule is to give the right-of-way grant

> "the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands."

In *Railroad Co.* v. *Jones*, (N. D.) 76 N. W. 227, and *Hamilton* v. *Spokane & P. Ry. Co.*, (Ida.) 28 Pac. 408, it was held that the Act of 1875 conveyed rights-of-way over land to which inchoate possessory pre-emption and homestead claims existed; but this conclusion was based largely upon the particular terms of the Act, and is directely in conflict with the decision of this Court in *Washington & I. R. Co.* v. *Osborn*, 160 U. S. 103, cited above.

The decision in *U. P. Ry.* v. *Douglass Co.*, 31 Fed. 540, was correct, but for a reason that has no bearing whatever on the present case. The Act setting apart the school sections, though passed prior to the grant of the right-of-way, did not make a present specific reservation but merely provided for reservation of the sections "when the lands within the said territory shall be surveyed." Such language in grants of sections 16 and 36 to school purposes is construed by the Supreme Court, not as a grant operating immediately subject merely to subsequent identification of the land, but as a promise to set apart a certain amount of land in the future, when surveyed, the land to be freely subject to the disposing power of Congress in the meantime. And the court has held that any Act relating to "public lands" applied to land which on subsequent survey was found to be included with the sections 16 and 36.

Heydenfeldt v. *Davey G. & S. Mining Co.*, 93 U. S. 634.
Minnesota v. *Hitchcock*, 185 U. S. 373.

The Act of 1854, then, involved in the Douglas County case, did not amount to a present reservation or grant, the lands still remained "public lands" in every sense of the word, and would be covered by any general disposition Congress might make of "public lands," whether it be a grant of right-of-way, of alternate sections, or something essentially different. Judge Brewer stated this ground in his opinion. His other

statements regarding the nature of the right-of-way grant are not supported by the authorities. And the attempted distinction of a right-of-way grant from other grants is rested wholly upon two cases which give not the slightest support to the distinction in question. One of them, *R. Co.* v. *Baldwin*, has already been discussed. In the other, the granting Act in *express terms* granted a right-of-way through reservations, being the same Act that was involved in the Roberts case in 152 U. S. 114.

It may, then, be regarded as established beyond any question that, in the absence of some clear and positive indication of a contrary intent, an Act of Congress granting land or rights in lands out of the "public lands" is to be construed as applying only to such lands as are open to sale or disposition under existing general laws, and as excluding any lands which have been previously reserved or appropriated for any other purpose, and that right-of-way grants are thus to be construed equally with other land grants. Is there any clear and positive indication of a contrary intent in Section 2 of the Act of July 1, 1862, sufficient to override this presumptive rule of construction?

The Circuit Court of Appeals in this case rested its decision on this point upon two grounds:

(1) That the existence of an express exception of Indian reservations in the grant of alternate sections in aid of construction (Sec. 3), and the absence of such express exception in the grant of right-of-way (Sec. 2), show that Congress intended to grant the right-of-way through such reservations.

(2) That the clause of Section 2 relating to extinguishment of the Indian titles, indicates that Congress intended by the Act to grant a right-of-way through Indian reservations.

The Absence of Express Exceptions in Section 2.

The first argument proves too much. It leads to consequences which in themselves furnish its refutation. As Judge Hook puts it in the lower court:

> "The application of them (*i. e.*, the express exceptions) exclusively to the land grant indicates the intention of Congress to give a right-of-way *across all lands without exception*, so far as it was within its power to do so."

If the contrast between the two sections in this respect has any effect upon the construction of Section 2, it leads to the conclusion, as Judge Hook says, that a right-of-way *across all lands without exception*, so far as it was within the power of Congress, was granted—over military reservations, over lands upon which inchoate pre-emption claims have attached. Yet it would hardly be seriously contended that Government military reservations were included in Section 2. And it has been conclusively determined by the decisions that Section 2 does not grant a right-of-way over lands upon which inchoate pre-emption claims had been filed. *Union Pacific R. Co.* v. *Harris*, 215 U. S. 386. If the argument will not apply to one of the cases covered by the express exceptions of Art. 3, it certainly will not apply to another; it is valid as to all or valid as to none.

The Contention That the Extinguishment Clause Extends the Grant to Express Indian Reservations.

Section 2 of the Act of July 1, 1862, after granting the right-of-way contains the following provision:

> "The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this Act, and required for the said right-of-way and grants hereinafter made."

The Circuit Court of Appeals assumed, without discussion and without consideration of the authorities, that this clause indicated the intent of Congress to grant a right-of-way through the Diminished Delaware reservation. This assumption is wholly gratuitous; it is not a reasonable inference from the language of the statute and it is in direct conflict with the decisions of the Federal Courts.

Is the extinguishment clause an adequate expression of the intent of Congress to deprive the Indians of a part of the land that had been set apart and granted for their separate perpetual use, and to give it to the railroad company? But a few years before it had been agreed by the Indians in the treaty of 1854, that any railroad should have a right-of-way through the lands allotted to the Indians upon paying the individual allottees—in other words, the Indians offered, with the approval of the United States, to sell such right-of-way to the company, if the company chose to buy; and in 1860 a similar privilege to purchase from the Indians a right-of-way for the projected line from Leavenworth had been specifically offered to the Leavenworth, Pawnee & Western Railroad Company. Then in the Act of 1862 is this clause whereby the United States promise to extinguish the titles of Indians along the route of the road. If this clause has any reference at all to the Delaware Diminished reservation, would it not seem rather to be a distinct recognition of the fact that those lands were not included in the grant and would not pass under it, and a promise that the United States would aid the grantee in acquiring such lands from the Indians, or would obtain such lands from the Indians and give them to the grantee?

In *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413, considering the effect of a similar agreement in the grant to the Atlantic & Pacific Railroad, the court said that it was

> "doubtful if the engagement of the Government amounted to anything more than an expression of its willingness to assist the company in acquiring Indian titles, if the company could persuade the Indians to relinquish such titles and the Government considered it consonant with their welfare to do so."

And in this connection it is to be observed, that the United States did not perform its promise to assist the railroad company in acquiring the rights of the Indians, but instead of doing so permitted the Indians to dispose of those rights to the grantors of the appellants and acted as the agent of the Indians in accomplishing this transfer. In the Buttz case, cited below, it will be noticed that the United States had performed its promise.

The generally accepted construction put upon such extinguishment clauses, however, is that its effect is to extend the grant to wild, unceded Indian lands occupied by the Indians under their original right of occupancy, but not to lands expressly reserved for their occupation or use by treaty—a doctrine established by the decision of the Supreme Court in *Buttz* v. *Northern Pacific R. Co.*, 119 U. S. 55. In that case it was held that the Northern Pacific land grant Act, which contained such an agreement, passed the fee of *unreserved lands* in the general occupation of the Indians, subject to the Indian right of occupancy, which latter the United States undertook to extinguish. That case did not involve and has no application to Indian reservations expressly created by treaty.

The very ground of the decision was that the lands in question had not been reserved or appropriated for any purpose. The distinction between such reservations and unreserved "Indian lands" has often been declared.

In *Caldwell* v. *Robinson*, 59 Fed. 653, the court distinguishing the merely unceded original right of occupancy by Indians, said:

> "This right of general occupancy to the public domain is quite different from that given the Indians when a special reservation is by law or treaty assigned to them; this the Government treats as something tangible and of it they are never deprived until they relinquish their claim."

In *L. L. & G. R. Co.* v. *U. S.*, 92 U. S. 733, the Supreme Court, referring to the extinguishment clause in this very Act of July 1, 1862, says that it was necessary "because the roads ran through territory occupied by tribes of wild Indians," and distinguishes the case before the court on the ground that "this road passed through a reservation, secured by treaty, and occupied by Indians at least partially civilized."

The Circuit Court has considered the effect of the decision in the Buttz case, and has taken the view expressed above and held that the Northern Pacific grant did not apply to Indian reservations.

Northern Pacific R. Co. v. *Hinchman*, 53 Fed. 523.

This question has been repeatedly passed upon by the Department of the Interior, and it is a settled ruling of the Department that the similar extinguishment clause in the Northern Pacific grant does not refer to Indian reservations, but merely to unreserved wild Indian lands, and that the grant conveyed no land lying within Indian reservations.

Dillone v. *Northern Pac. R. R. Co.*, 16 U. S. Land Dec. 229.
Northern Pac. R. Co. v. *Warren*, 28 *id.* 494.
Warren v. *Northern Pac. R. Co.*, 22 *id.* 568.
Northern Pacific R. Co. v. *Eberhard*, 19 *id.* 532.
Northern Pacific R. Co. v. *Haynes*, 20 *id.* 90.
Northern Pac. R. Co. v. *Maclay*, 26 *id.* 43.
Northern Pac. R. Co. v. *Clark*, 5 *id.* 138.
Whitney v. *Northern Pac. R. Co.*, 1 *id.* 343.
Phelps v. *Northern Pac. R. Co.*, 1 *id.* 368.
William P. Maclay, 2 *id.* 675.
Atlantic & Pacific R. Co., 13 *id.* 373.
Atlantic & Pacific R. Co. v. *Tiernan*, 17 *id.* 587.

In the last two cases above cited, the same ruling was made regarding the grant to the Atlantic & Pacific Railroad Company, containing a similar extinguishment clause. In the case in 17 U. S. Land Decisions, 587, the Secretary of the Interior thus described the meaning of the extinguishment clause:

> "Congress had before it the problem of Indian *occupancy*. It treated that matter plainly and clearly, and if it had intended the company's grant to attach to the fee, and the Indian *reservations* should be only a use or easement in the land terminable in the future, it could easily and would certainly have said so. It did not so provide, and it is not within the province of this department to change, modify or improve upon congressional enactments."

The construction given to a statute by those charged with its execution has much weight and ought not to be overruled without cogent reasons. The decisions of the Department of the Interior in regard to the construction and effect of statutes relating to congressional grants of the public domain, especially when followed consistently for many years, will be accepted by the courts as correct, unless obviously wrong.

U. S. v. *Hammers*, 221 U. S. 220.
U. S. v. *Moore*, 95 U. S. 760.
Edwards v. *Darby*, 12 Wheat. 206.
U. S. v. *Burlington & Mo. R. R. Co.*, 98 U. S. 334.
Brown v. *U. S.*, 113 U. S. 568.
Hewitt v. *Schultz*, 180 U. S. 139.
St. Paul, etc., R. Co. v. *Phelps*, 137 U. S. 528.
Hastings, etc., R. Co. v. *Whitney*, 132 U. S. 357.
McFadden v. *Mountain View Min. & Mill Co.*, 97 Fed. 670.

There is no force in the argument that the extinguishment clause must have referred to Indian reservations because the only Indian lands along the proposed line were express reserva-

tions. The extinguishment clause appears in the grant to the Union Pacific, a railroad whose proposed route passed over great extents of undoubted unreserved public lands either wholly unoccupied or sparsely peopled by unsettled bands of wild Indians. There is no necessity for giving to the clause a strained construction. There was abundant room for its operation without violating the just and reasonable settled principles of construction applicable to such grants. The Leavenworth, Pawnee & Western and other roads are, by subsequent sections of the Act, authorized in general terms to build certain lines "upon the same terms and conditions" as had been specified in the sections relating to the Union Pacific. Except by reference to these provisions, there is no specific grant of right-of-way to the Leavenworth, Pawnee & Western. The Kansas corporation, as it is called in the Act, could claim no greater or more extensive rights than the Union Pacific and must take subject to all the limitations, exceptions and restrictions expressed or implied in the grant to the latter company. If the grant to the Union Pacific would not include an Indian reservation established by express treaty, it would gain no greater force when extended by reference to the Leavenworth, Pawnee & Western.

Counsel for appellee, as well as the Circuit Court of Appeals, overlook the fact that the extinguishment clause by its express language applies to the grants of alternate sections in Section 3, as well as to the right-of-way grant in Section 2, and plainly evinces an intent to treat the two grants exactly alike in this respect. The words of the clause are, "all lands falling under the operation of this Act and required for the said right-of-way *and grants hereinafter made.*" The grants "hereinafter made" include those in Section 3. In the only case in which this Court has even applied such an extinguishment clause, it was applied, not to the right-of-way grant, but to the grant of lands contained in the following section

of the Act, corresponding exactly to Section 3 of the Union Pacific grant. (*Buttz* v. *Northern Pacific R. Co.*, 119 U. S. 55.) If the clause makes the right-of-way grant applicable to Indian reservations, it equally makes the grant of alternate sections applicable thereto. If, notwithstanding the clause, the grant of alternate sections does not include Indian reservations (and it is well settled that it does not), then similarly the right-of-way grant does not include such reservations.

No mere implication of an intent to include in the grant of right-of-way such lands expressly guaranteed to Indians by treaty, based upon the importance of the undertaking to be furthered and the supposed desire to effect its accomplishment at all events, can override the just and equitable presumption against the existence of an intent to break faith with the Indians and to violate treaty obligations. The principle of construction is plain enough, and it requires an express and definite expression of intent to include within the operation of the grant such lands as these, which every dictate of justice and public faith demands should be held inviolable. The courts cannot afford to speculate in such a matter upon the exigencies of the occasion or the provision which Congress ought to have made for the benefit of the great undertaking. They have to deal only with the aid which Congress actually did grant. The court is asked to regard solely the interests and desires of the railroad companies, and to neglect whatever claims, rights and interests others may have. It is asked to assume upon mere conjecture that Congress desired the fullest possible aid to be given to the new undertaking regardless of incident breach of faith and violation of solemn treaty obligations, and then the court is asked to do what Congress failed to do, to raise this conjectural unexpressed assumption of congressional desire to the dignity and force of a statutory enactment. It is a novel view of the judicial province.

The argument that, from the failure of the Land Grant Act to give the railroad company any power of eminent domain to acquire the Indian lands by condemnation, is to be inferred an intent to grant directly a right-of-way across such lands, is not sound. In the Act of 1862, upon which the right of appellee rests, there was no grant of a power to take by eminent domain land upon which inchoate pre-emption claims had been filed. Does not that reasoning, then, lead to the conclusion that a right-of-way was granted through such lands? But it has been conclusively determined that it was not. *Union Pacific R. Co.* v. *Harris*, 215 U. S. 386. So the argument fails. There is certainly no greater reason for applying it to the lands granted to Indians than to government lands upon which mere inchoate pre-emption claims had been filed; the need was as great in the one case as in the other.

As a matter of fact, there was a way in which the railroad company could have obtained a right-of-way across the lands of the Delaware Indians, namely, by paying to the allottees a just compensation—a privilege given by the treaty of 1854, wherein the Delaware Indians expressly promised that all railroads passing through the reservation should have a right-of-way "on the payment of a just compensation therefor in money." There was, therefore, no need whatever of a grant from the United States of such right-of-way through these lands. Even if appellee's argument in this regard could give support to the contention that the right-of-way was granted through pre-empted lands, it can give none to the contention that the grant applied to the Delaware Diminished reservation.

The appellee referred in its brief in the Circuit Court of Appeals to several cases in which it is contended that this question has been settled in its favor. None of them, it is to be observed, passed upon the rights of the present appellants, and the matter is in no respect *res judicata*.

In *Grinter* v. *Kansas Pacific Ry. Co.*, 23 Kan. 642, the plaintiff claimed adversely to the railroad company as an allottee, but it was held that he was not a member of the tribe and not entitled to the right of an allottee under the treaty of 1860. This in itself disposed of the case, though the court proceeded to state the effect of the Act of July 1, 1862. But little attention was paid to the decisions of the Supreme Court of the United States bearing on the construction of such grants and, in so far as mentioned at all by the court or by defendant's counsel, the points principally decided in them were wholly ignored. Throughout, it was assumed by the court and by counsel for defendant that the only real question was whether Congress had *power* to grant a right-of-way through the allotted lands. To such argument as the court did advance in support of their view of the construction to be put on the grant, we believe we have already made sufficient answer. It is further to be observed in connection with the Grinter case, that the only land in dispute was the one hundred foot right-of-way of which the defendant actually took possession, and the right to which is not in controversy now.

State v. *Horn*, 34 Kan. 556, does not touch upon any of the questions involved in this case, the only matter discussed or decided being whether a board of county commissioners had acted regularly. Nor does the decision on the second appeal in the same case (35 Kan. 717) come any closer; the only point decided was that a highway had not been created either by prescription or dedication—the ownership of the land was not involved.

In *Union Pacific Ry. Co.* v. *Kindred*, 43 Kan. 134, the title of the railway company to the full four hundred foot right-of-way claimed by it was admitted by both parties and the matter was not discussed, though the court, solely on the

authority of the Grinter case, makes the bald statement that the railway company had title.

In *Union Pacific Ry. Co.* v. *Shannon* (unpublished), it is uncertain whether the highway in question was within or without the one hundred foot right-of-way actually possessed by the railway company. Judge Brewer does, indeed, hold that the company owned a right-of-way four hundred feet wide. But the matter was not discussed at all and was decided upon the sole authority of the Grinter case.

The Grinter case is, indeed, the unstable foundation upon which it is proposed to support a claim which is plainly invalidated by the decisions of the Supreme Court of the United States. Mere *obiter dictum* as it was, it has given rise to two subsequent decisions in which, without argument or discussion, the title of the railway company was assumed as a matter of course.

III.

The Act of Congress of July 2, 1864.

Two years subsequent to the enactment of the original Pacific Railroads Act, on July 2, 1864, Congress passed as amendatory thereto an Act conferring upon the same companies the power of eminent domain and increasing the extent of the previous grant of lands to aid in construction of the roads. The Act further provided that any lands granted by the Act or by "the Act to which this is an amendment"—*i. e.*, the Act of July 1, 1862—should not "include any Government reservation." The predecessors in title of the appellee accepted the benefits of this Act and thereby became subject to its limitations, as well those upon the original grant of July 1, 1862, as those upon the grants contained in the amendatory Act itself. (R. 35.)

See,

Humbird v. *Avery*, 195 U. S. 480.
Heydenfeldt v. *Davey G. & S. Mining Co.*, 93 U. S. 634.

This principle finds frequent illustration in the cases where, by accepting an additional grant of powers or franchises, a corporation becomes subject to new restrictions imposed by the granting Act. It has been applied in several instances by the Department of the Interior to cases of public land grants similar to the present one.

St. Paul, etc., R. Co. v. *Chadwick*, 6 U. S. Land Dec. 128.
St. Paul, etc., R. Co. v. *Moling*, 7 *id.* 184.
St. Paul, etc., R. Co. v. *Thompson*, 10 *Id.* 507.

By "Government reservation" is obviously meant any public land reserved by the Government for any special use. Indian reservations are undoubtedly included within the meaning of the term.

Leavenworth, L. & G. Co. v. *U. S.*, 92 U. S. 733.
Hot Springs Cases (*Rector* v. *U. S.*), 92 U. S. 698.
A. & P. R. Co. v. *Mingus*, 165 U. S. 413.
Cohn v. *Barnes*, 5 Fed. 326, 331.
Rio Verde Canal Co., 27 U. S. Land Dec. 421.

In *Leavenworth, L. & G. R. Co.* v. *U. S.*, *supra*, the Supreme Court in reply to the contention that an Indian reservation was not "reserved to the United States" within the language of a railroad land grant, said:

> "The treaty, the joint work of the United States and the Indians, reserved them as much to one as the other of the contracting parties. Both were interested therein and had title thereto. In one sense, the lands were reserved to the Indians, but in another and broader sense, to the United States for the use of the Indians.

Every tract set apart for some special use is reserved to the Government, to enable it to enforce that use. And there is no difference, in this respect, whether it be appropriated for Indian occupancy or for other purposes."

"A construction which would limit it (the proviso excepting reservations) to lands set apart for military posts and the like, and deny its application to lands appropriated for Indian occupation, is more subtle than sound."

Whatever may have been the extent of the original grant made in 1862, the grantee, by accepting the increase offered it, and the new benefits and privileges conferred upon it by the amendatory Act, was bound by the limitation imposed upon the extent of its title and rights by that Act. By doing so, the grantee, predecessor in title of the present appellee, absolutely precluded itself, and all claiming under or through it, from any valid claim of title or rights in any Indian reservation.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 51.

L. P. KINDRED ET AL,
Appellants,

against

UNION PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE APPELLEE.

MAXWELL EVARTS,
Of Counsel for Appellee.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States,

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No. 51.

L. P. KINDRED, ET AL.,
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UNION PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE APPELLEE.

Statement.

The Leavenworth, Pawnee and Western Railroad Company was organized in 1855 under an Act of the Legislature of the Territory of Kansas (Territorial Statutes of 1855, p. 914, Record, p. 31). By section 9 of the Pacific Railroad Act of July 1, 1862 (12 U. S. Stats., 489), it was granted a right of way two hundred feet in width on each side of its road through the public lands of

the United States. On July 17, 1862, the Leavenworth Company filed a map with the Secretary of the Interior showing the general route of its road and thereafter filed its map of definite location showing the same route which extended from the mouth of the Kansas River on the south side across the Delaware Diminished Indian Reservation, and connected with the Union Pacific as provided in the Act of 1862. The railroad of the Leavenworth Company was constructed across the Delaware Indian Reservation on the route shown by the map of general route filed on July 17, 1862, and was in operation across such Reservation within two years from July 1, 1862. The railroad was accepted by the proper officers of the Government as provided in the Act of 1862, and was continuously operated by the Leavenworth Company and its successors until the year 1898 when the defendant in error succeeded to the right, title and interest of the Leavenworth Company, and has since operated the said railroad (Record, pp. 31–35).

Through the Delaware Indian Reservation the Leavenworth Company and its successors continuously maintained a fence on each side of the

track and fifty feet therefrom, except at stations where the right of way fence was placed at a greater distance from the track. The appellants have claimed to own and have used and cultivated all the land outside the fence and within the four hundred foot right of way (Record, p. 36).

In 1905, because of the increase of its business it became necessary for the Union Pacific Railroad to build a second track from Kansas City to Topeka across the Delaware Reservation and in order to secure prompt and efficient service to do away with certain curves and grades. It therefore removed its fences along the one-hundred foot strip which it had previously used and began the work of double-tracking the road and changing the curves and grades across the Delaware Reservation. The appellants resisted and undertook to regain possession of the lands claimed by them beyond the limit of fifty feet on either side of the center of the railroad and within the four-hundred foot right of way (Record, p. 37).

Thereupon and on March 14, 1905, the Union Pacific Railroad Company filed a bill in equity in the United States Circuit Court for the District of Kansas, First Division, seeking to enjoin

the appellants from entering upon the strip of two hundred feet in width upon each side of its main track through the Delaware Reservation or from interfering with the use thereof (Record, p. 3).

Thereafter, and on December 4, 1905, an answer was filed by the appellants insisting that at the time of the grant of the right of way to the Leavenworth Company by the Act of July 1, 1862, the lands in question were not public lands because of treaties between the United States and the Delaware Indians (Record, p. 18).

The case was tried and the prayer of the bill of complaint of the Union Pacific Railroad was granted. The trial court held that at the time of the grant of the right of way to the Leavenworth Company under the Act of July 1, 1862, the lands in question belonged to the United States and were public lands of the United States within the meaning of the grant, the Delaware Indians simply having a right to occupy the same subject to such other disposition thereof as the United States might make.

Upon appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, the decree of the lower court was affirmed, and from such judgment of affirmance, this appeal has been taken.

The two important questions presented are,—

(1) Whether the right of occupancy by the Delaware Indians of the land in question prior to the Treaty with the United States of 1860 (12 U. S. Stats., 1129), was changed by said Treaty so that the Indians acquired any other or greater right or title to the land than they had before, by reason of which such land had ceased to be public land at the time of the right of way grant to the Leavenworth Company under the Act of Congress of 1862.

(2) Whether the Indians did not surrender all interest in the land in question by receiving from the United States payment for the right of way of the Leavenworth Company across said land, and if so whether such surrender does not bind the appellants, their successors in title.

FIRST POINT.

At the time of the Pacific Railroad Act of July 1, 1862, the Delaware Indians were the wards of the nation and had only a right of occupancy to the lands in the Delaware Reservation, and such lands were at the time public lands of the United States within the meaning of the second and ninth sections of said Act of 1862.

By section 9 of the Act of Congress of July 1, 1862 (Appendix to brief, p. II), the Leavenworth Company was authorized to construct its railroad "upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned" (12 U. S. Stats., 489, 494). On turning to section 2 of said Act (Appendix to brief, p. I) we find that the railroad and telegraph line first mentioned in said act was given a right of way as follows:

> "That the right of way through the public lands be and the same is hereby granted to said Company for the construction of said railroad and telegraph line. * * * The United States shall extinguish as rapidly as may be the Indian titles *to all lands falling under the operation of*

this Act and required for the said right of way and grants hereinafter made."

The foregoing was the clear, definite and explicit grant from the United States to the Leavenworth Company of its right of way across the public lands and at the time of making the grant Congress understood that lands as to which Indians had a right of occupancy were public lands, for in this very granting section it is provided that when there are any "lands falling under the operation of this act" (*i. e.*, public lands), as to which there is any Indian title (right of occupancy), the United States shall itself extinguish such Indian title.

The position of the appellee is that the lands in question were at the time of the passage of the Act of 1862 public lands within the meaning of section 2 of the Act and that Congress so understood when it provided that it would extinguish whatever title the Indians might have to any lands "required for the said right of way."

Moreover, the policy of the general government has always been that the United States and the United States alone should have dealings with the Indians—its wards. Neither the railroads nor individuals were permitted to ex-

tinguish, by purchase or in any other way, any right of occupancy which the Indians might have in the lands of the United States. For this reason, therefore, such lands must be deemed to be public lands so far as the people of the United States are concerned, with the right in the Government alone to extinguish the Indian title whenever such lands were necessary for purposes other than the occupancy thereof by the Indians. In *Johnson and Graham's Lessee vs. M'Intosh*, 8 Wheat., 543, Chief Justice MARSHALL said, at page 585:

> "It has never been doubted that either the United States or the several States had a clear title to all the lands within the boundary lines described in the treaty [Treaty with Great Britain concluding the War of the Revolution], subject only to the Indian right of occupancy, and that *the exclusive power to extinguish that right* was vested in that government which might constitutionally exercise it."

In the consideration of this question it is necessary to have in mind the unusual relation to Indian lands of the General Government and of the Indians themselves. It has long been established that the Indians were the wards of

the Nation, or as Chief Justice MARSHALL said in *Cherokee Nation vs. State of Georgia*, 5 Peters, 1, 17, "they are in a state of pupilage" and "their relation to the United States resembles that of a ward to his guardian," and certainly from the beginning of the Government until long past the year 1862, the treaties with the Delaware Indians show them to have had no more than what was commonly called an "Indian title" to their lands, which was a right of occupancy only, the true title being in the United States. In other words the right of the Delaware Indians to these lands as the wards of the Nation was no more or greater than the right of an orphan in an asylum to the lands of such institution. As stated by Mr. Justice GRAY in *Jones vs. Meehan*, 175 U. S., 1, 8:

> "Undoubtedly the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only. The ultimate title in fee in those lands was in the United States and the Indian title could not be conveyed by the Indians to anyone but the United States without the consent of the United States."

The expression "Indian title" is perhaps misleading, and was not intended to convey the idea

that the Indians had title to their lands in the usual meaning of the term, but only a right to live on them, subject to whatever disposition the United States might see fit to make of them.

Mr. Justice BREWER, when Judge of the Supreme Court of Kansas, clearly brought out this point in the case of *Veale vs. Maynes* (23 Kas., 1), where it appeared that a certificate of allotment under the Treaty of 1861 with the Pottawatomie Indians was issued to A, a member of the family of which B was the head. Afterwards, and under the Treaty of 1867, a patent to the same land was issued to B, and it was held by the Court that the full title passed by said patent to B free from all claims and equities in favor of A by reason of the prior allotment of the land to him. In the course of his opinion Mr. Justice BREWER said, at page 23:

> "The starting point is of course the Treaty of 1846. By that the first cession of this land was made to the Pottawatomies, and it is claimed that by it something more than the ordinary Indian title was granted to the Nation. Stress is laid upon the words 'possession and title', and the use of the latter, it is said, implies something more than the mere right of occupancy that would

pass under the former word. It may be that those words in the language of a grant to a corporation or citizen would imply the grant of the title of the grantor. A contract between individuals to convey title might mean full title, but these words in the treaty must be construed in the light of the recognized relations between the Government and the Indians and the established policy of the former toward the latter. Title does not necessarily mean title in fee simple; it may mean any kind of title—even the mere title by occupancy. *The Indian title has been constantly recognized as simply this inferior title.* The Government has uniformly asserted its holding of the fee, and has recognized the Indian right as only one of possession. The Supreme Court reports are full of this doctrine."

In *Cherokee Nation vs. State of Georgia*, 5 Pet., 1, this Court said by Chief Justice MARSHALL at pages 16 and 17:

"The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. * * * They occupy a territory to which we assert a title independent of their will which must

take effect in point of possession when their right of possession ceases."

Keeping before us the peculiar relations of the United States and of the Indians to the wild lands of the country we come to a consideration of the treaties with the Delawares and among the earlier ones, we find the Treaty of January 21, 1785 (7 U. S. Stats., 16, 17), negotiated two years prior to the adoption of the Constitution. By article four of this Treaty it was provided that:

> " The United States allot all the lands contained within the said lines to the Wiandot and Delaware nations, *to live and to hunt on.*"

On January 9, 1789, another treaty was made with the Sachems and Warriors of various tribes including the Delaware Indians (7 U. S. Stats., 28, 29). By Article three of this Treaty, it was provided that:

> " The United States of America do by these presents relinquish and quit claim to the said nations, respectively, all the lands lying between the limits above described for them the said Indians *to live and hunt upon and otherwise to occupy* as they shall see fit.

> But the said nations, or either of them, shall not be at liberty to sell or dispose of the same, or any part thereof, to any sovereign power, except the United States ; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States."

In the Treaty with the Delaware Indians of 1795 (7 U. S. Stat., 49), for fear there might be some misunderstanding with reference to certain lands relinquished by the United States to the Indians, it was especially provided by the Fifth Article as follows :

> " To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared that the meaning of that relinquishment is this : the Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States. But when those tribes or any of them shall be disposed to sell their lands or any part of them they are to be sold only to the United States, and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against

all citizens of the United States and against all other white persons who intrude upon the same."

It is interesting to note that in the subsequent treaty of September 29, 1817, made with the Sachems, Chiefs and Warriors of various tribes of Indians, including the Delawares, it was agreed by the United States to grant the lands in question by patent in fee simple to certain of the chiefs for the use of the individuals of said tribes (7 U. S. Stats., 160).

This was a departure from previous treaties, which had all proceeded upon the theory that the Indians had a right to occupy the land but that the title to the soil occupied by them belonged to the United States, and that the Indians held whatever rights they had subject to the will of the United States.

About one year after the Treaty of September 29, 1817, and on September 17, 1818 (7 U. S. Stats., 178), a supplementary treaty was concluded which in its first article provided as follows:

"It is agreed between the United States and the parties hereunto, that the several tracts of land, described in the treaty to

which this is supplementary, and agreed thereby to be granted by the United States to the chiefs of the respective tribes named therein, for the use of the individuals of the said tribes, and also the tract described in the twentieth article of the said treaty, shall not be thus granted, but shall be excepted from the cession made by the said tribes to the United States, reserved for the use of the said Indians, *and held by them in the same manner as Indian reservations have been heretofore held.*"

The provisions of this last treaty that the land granted by the previous treaty in fee simple should not be thereby granted but should be " held by them in the same manner as Indian reservations have been heretofore held," is certainly significant.

The Treaty of September 29, 1817, is the first to suggest any grant in fee simple by the United States of lands to the Indians, and was so quickly repudiated that its only purpose is to accentuate the proposition that the title of the Delaware Indians to the lands occupied by them was nothing but the Indian title of occupancy—*i. e.*, the right to live on them and to hunt upon them.

The history of the Delaware Indians with reference to their lands is the same as the history of the other Indian tribes which is given by Chief Justice MARSHALL in the case of the *Cherokee Nation vs. State of Georgia*, 5 Peters, 1, 15, in these words :

> " A people once numerous, powerful and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence."

In 1818 we find the Delaware Nation giving up its claim to any land in the State of Indiana, and in consideration of such surrender "the United States agreed to provide for the Delawares a country to *reside in* upon the west side of the Mississippi and to guarantee to them the peaceable possession of the same" (Treaty of October 3, 1818, 7 U. S. Stats., 188).

That the land the Delaware tribe had a right

to "reside in upon the west side of the Mississippi" was not theirs in fee simple and that they only had a right of occupancy is shown by Article seven of the Treaty which gives small tracts to certain named persons and their heirs, but even these small tracts of lands are not given in fee simple, but can only be conveyed or transferred by the grantee "with the approbation of the President of the United States."

A supplementary article to the Delaware Treaty of October 3, 1818, was concluded September 24, 1829, by which the country from the fork of the Kansas and Missouri rivers was "conveyed and forever secured by the United States to the said Delaware Nation as their *permanent residence*," and the United States guaranteed to the Delaware Nation "the quiet and peaceable possession and undisturbed enjoyment of the same against the claims and assaults of any other people whatsoever" (7 U. S. Stats., 327).

Nothwithstanding the solemn guaranty of a permanent residence by the foregoing treaty the Delawares were required by the Treaty of May 6, 1854 (10 U. S. Stats., 1048), to relinquish a large portion of their lands to the United States; another portion was given up to be sold for their

benefit, the remainder of the land which was commonly called the Delaware Diminished Reservation was retained for their permanent home, and whenever requested by the Delaware Indians it was to be surveyed and a portion thereof was to be assigned to each person or family as shall be designated by the principal men of the tribe.

We now come to the Treaty of May 30, 1860 (12 U. S. Stats., 1129). This treaty is believed by the appellants to have changed in some way the relation of the Delaware Indians to the lands occupied by them. The important feature of this treaty is that the land, instead of remaining common for the Indians to live on, was assigned in severalty, eighty acres to each member of the Tribe. This was done in pursuance of Article Eleven of the Treaty of May 6, 1854 (10 U. S. Stats., 1048).

This setting apart of eighty acre tracts in severalty did not however give the Indians any fee in the land, as it was expressly provided by Article two that—

> " said tracts shall not be alienable in fee, leased or otherwise disposed of except

to the United States or to members of the Delaware Tribe and under such rules and regulations as may be prescribed by the Secretary of the Interior" (12 U. S. Stats., 1129, 1130).

By Article three of this Treaty it was provided that after the assignment of the tracts in severalty the Leavenworth Pawnee and Western Railroad Company should have the preference of purchasing the remainder of the lands in the Indian Reservation, and that the United States should issue a patent in fee simple to said Company for all other land remaining in Kansas after such allotment upon the payment into the United States Treasury of a certain sum per acre.

It was also provided that the Leavenworth Company should have a perpetual right of way over any portion of the lands allotted to the Delawares in severalty on payment of just compensation in money to the respective parties whose lands were crossed by the railroad.

It is not clear how this Treaty of 1860 changed in any way the relation of the Indians to the lands in question except that instead of having a tribal right to the occupancy of the land they were given a right of occupancy in severalty.

Outside of this the right of occupancy remained the same and the Delawares to whom the lands were apportioned in severalty had simply exchanged their tribal or communal right of occupancy for an individual right of occupancy. Other than this there was no change in their relation to the lands.

We refer again to the decision of Mr. Justice BREWER (then Judge of the Supreme Court of Kansas) in the case of *Veale vs. Maynes* (23 Kas., 1). The treaties there involved with the the Pottawatomie Indians were substantially the same as the treaties with the Delaware Indians, and the sole question in the case was whether a member of the Pottawatomie Tribe had acquired any further or greater right than the mere right of occupancy by the allotment of eighty acres of land under the Pottawatomie Treaty of 1861 (12 U. S. Stats., 1191), which was substantially the same as the Delaware Treaty here involved of 1860 (12 U. S. Stats., 1129). The question then before Mr. Justice BREWER was precisely the question which is now presented to this Court. In discussing what if anything a member of the Pottawatomie Tribe acquired by the allotment of eighty acres of land, Mr. Justice BREWER said at page 26:

"Now what was intended by this division—that the title be thus divided up or the mere matter of occupancy? Of course either was within the power of the contracting parties. They might provide for a division among the several Indians which should vest an absolute title in each * * * or they might provide for an individualizing of the right of occupancy giving to each person a sole right of occupancy in a particular tract a right guaranteed against invasion by any individual but still within the power of the tribe as a tribe to convey by treaty. In other words, while there remained the tribal home each individual desiring it should have separate control of certain lands yet subject to the ultimate power of the tribe to change their home and to make absolute conveyance of the whole body of land. The power of the tribe *as a tribe* remained undisturbed over both the allotted lands and those held in common. That this was the intent and effect of the treaty we are constrained to hold and this notwithstanding many expressions which if used in ordinary contracts between individuals would have marked significance to the contrary. * * * The full force of this argument will become more apparent when we consider the subsequent treaty of 1867. At present it is

> enough to notice that the allottee remained a member of the tribe and if the intention had been to enlarge his title from the ordinary Indian title—one of occupancy—to that of a fee simple the intention would, it seems, have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians occupied the tribal home, it was enough that that difference was made clear and language used to indicate that should not be carried to some further meaning."

Afterwards Mr. Justice BREWER took up the discussion of the Pottawatomie Treaty of 1867 (15 U. S. Stats., 531), which is practically similar to the Delaware Treaty of 1866 (14 U. S. Stats., 793), and explained how the treaty of 1867 demonstrated that the right of the Pottawatomie Indians under the Treaty of 1861 was not enlarged thereby, but still remained only a right of occupancy until the Treaty of 1867, which then provided for a conveyance in fee simple to the Indians upon compliance by them with the terms of said treaty.

In other words, Mr. Justice BREWER held that the allotment of the land to the Pottawatomie

Indians under the Treaty of 1861 made no change in the relation of the Indians of that Tribe to the land in controversy, except that the land instead of being held in tribal occupancy was to be held in personal or individual occupancy, and that no enlargement of the right of the Indians to occupy the land was to be found until the right to a patent in fee simple was given to them under the Treaty of 1867. The conclusion of the Court was stated at page 31 as follows :

> " That the Treaty of 1867 authorized a patent in fee simple to the head of the family of lands prior thereto allotted to the members of his family and that such provision was not invalidated by any prior treaties or in derogation of any vested rights."

The argument of Mr. Justice BREWER in the *Veale case* is precisely the argument which we now urge before this Court, namely, that the Delaware Indians had no other, further or greater right to their lands by reason of the Treaty of 1860 than they had before. This treaty simply changed their right to a tribal occupancy into a right to a separate or individual

occupancy, but their right to the land still remained a right of occupancy only with the title to the land in the United States. No intention or disposition on the part of the United States to change that Indian right is shown until long after the grant of 1862 of the right of way to the Leavenworth Company and not until the Treaty of 1866 to which we refer later, and by which the Delawares upon a dissolution of their tribal relations were permitted under certain conditions to acquire for the first time a fee simple to certain of their lands theretofore occupied by them.

If by the allotment of the land in the *Veale case* the allottee acquired no right or title which prevented the United States from conveying the land in fee simple to another notwithstanding such allotment, it is difficult to see how in the present case the allottees under the Treaty of 1860 acquired any right or title which would prevent the United States from granting the right of way to the Leavenworth Company notwithstanding such allotments. It would seem as if the two cases were identical in principle.

Of course the provision as to the right of way of the Leavenworth Company over the lands allotted in severalty upon payment of compen-

sation was not the source from which the company obtained the right of way in controversy. This Treaty was concluded in 1860 and was an agreement between the Delaware Indians and the United States to which the Leavenworth Company was not a party. The provision did not state who was to pay this compensation. There is no reason to suppose that the railroad was free to negotiate with the Indians in reference to the purchase of a right of way across the lands assigned in severalty. This would have been contrary to the policy of the Government. The United States alone was empowered to deal with the Indians, and for all that appears in this Treaty it was the United States that was to arrange for the payment of any compensation in case the railroad company should desire to take advantage of these provisions of the Treaty.

It would certainly seem that at the date of the Treaty of 1860 the United States intended to itself pay for the right of way referred to therein, because, when two years later it granted the right of way in question to the Leavenworth Company, it expressly provided that it would itself extinguish any Indian title that there might be to the " lands falling under the operation " of the

granting act and "required for the said right of way."

The fact that in 1892 the United States appropriated money to pay the various allottees under the Delaware Treaty of 1860 for the right of way of the Leavenworth Company, and did pay them, would seem to permanently settle that it was the United States and not the railroad company which was to compensate the Indians for the right of way across their lands.

The foregoing somewhat exhaustive examination of the treaties with the Delaware Tribe shows very clearly that up to the time of the Pacific Railroad Act of 1862 the Delawares had no claim whatever to the land in question except a right of occupancy at the will of the United States. This view is strongly emphasized by the Ninth Article of the Treaty of July 4, 1866 (14 U. S. Stats., 793, 796), where it was provided that all the Delaware Indians who had elected to dissolve their tribal relations and to become citizens of the United States as provided in that Treaty and had gone through the preliminary qualifications should be entitled to receive "a patent in fee simple with power of alienation for the land heretofore allotted to him." This Treaty of 1866 was in accord with the policy of

the Government that the Indians as tribes had no right to any lands of the United States save a right of occupancy and that not until they had severed their tribal relations and become with proper formalities citizens of the United States were they permitted to acquire any land in fee simple.

We therefore feel safe in saying that not until after 1866 did the Delaware Indians acquire any title to the lands in the Delaware Reservation, and that prior to that time and in 1862 and certainly at least in 1864, when the road had been completed across the reservation the Leavenworth Company had acquired its right to the lands in question under the grant of 1862 because up to that time and certainly until after the Treaty of 1866 with the Delaware Indians such lands were public lands within the meaning of the second section of the Pacific Railroad Act of 1862.

The treaties with the Delaware Indians to which we have called attention show on their face beyond any chance for doubt that at the time of the grant to the Leavenworth Company in 1862 of its right of way the Indians had a right of occupancy only in their lands subject to the will of the United States. Practically

they were tenants at will with a right on the part of their landlord to terminate their tenancy at any time and such tenancy could of course at the will of the United States be terminated by a Congressional grant of their lands as well as in any other way.

This question however of the right of the Leavenworth Company and its successors to the right of way across the lands of the Delawares is no longer open for determination under the language of the treaties, but has long since become an established rule of property in the State of Kansas under the decisions of its highest court. For over thirty years the Supreme Court of Kansas has held in repeated decisions that the Leavenworth Company and its successors had a right of way under the Act of 1862 over the lands of the Delawares for the reason that at the time of the grant these lands were public lands of the United States within the meaning of the granting act of 1862; that the Indians had therein only a right of occupancy subject to termination by the general government at any time, and that such right of occupancy was terminated by the Congressional grant of the right of way in 1862, and that that grant gave the

Leavenworth Company a right across the Indian lands without requiring any compensation to be paid by the railroad company therefor, the general government, under the express terms of the granting act, having assumed the duty of extinguishing any rights that the Indians might have to the land.

The first case in which this question arose is *Grinter vs. Kansas Pacific Railway Company* (23 Kas., 642). Mr. Justice BREWER was a member of the Court which delivered the opinion. In that case it appeared that the plaintiff claimed to possess and occupy certain land which had been allotted to his wife and children under the Delaware Treaty of May 30, 1860, and brought an action against the railroad company to recover damages for an alleged trespass upon his lands. The trial court rendered judgment for defendant, and upon appeal the judgment below was affirmed, the Court holding that there was "nothing in the Delaware Treaty of May 30, 1860, to indicate that any other right or title was granted to the allottees and assignees by the stipulations in articles one and two than the right of occupancy with the ultimate fee to the land in the United States," and that Congress in 1862 "had the exclusive right and do-

minion over the Delaware Reservation in Kansas and had full power to permit the construction of a railroad over such reservation" by the Leavenworth Company, either with or without compensation. The Court then held that,—

> "Under the provisions of the act of Congress of July 1, 1862, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' Congress granted to the Leavenworth, Pawnee and Western Railroad Company at Kansas, in 1862 called the Kansas Pacific Railway Company, now the Union Pacific Railway, Kansas Division, the right of way through the public lands of the United States for its road, and agreed to extinguish as rapidly as might be the Indian title required for such right of way. This grant included a right of way through the Delaware Reservation in Kansas, and under the grant the company had the authority in November, 1863, without paying compensation to the Delaware allottees to enter upon the Reservation for the purpose of locating its line of road and laying out its right of way and thereafter of constructing and operating its road over and across said lands" (Syllabus).

The *Grinter case* was decided in 1880, and has been the law of Kansas ever since.

In the cases of *State vs. Horn* (34 Kas., 556), and *State vs. Horn* (35 Kas., 717), the county authorities undertook to lay out a county road upon the right of way of the Union Pacific granted by the act of Congress of 1862. The Railroad Company objected, and its employee Horn was arrested charged with obstructing the highway. The Supreme Court of Kansas, after stating that the Railroad Company acquired its right of way under the grant of 1862, held that the authorities had power to locate a highway on such right of way, but concluded that they had not legally exercised such power. As additional prosecutions by the State authorities were threatened the Railroad Company applied to the federal court for an injunction. The title of the case in the federal court was *Union Pacific Railroad Co. vs. Hugh Shannon.* The application for an injunction was heard by Mr. Justice BREWER, then United States Circuit Judge, and an injunction was granted. Mr. Justice BREWER cited the *Grinter case*, and held that the railroad company had a right of way two hundred feet wide on each side of its track. The opinion in this case

was not published but a copy appears at page 38 of the record. In the course of his opinion Mr. Justice BREWER said—

> " that the complainant owns a right of way two hundred feet in width on either side of its track has been decided by the Supreme Court of Kansas (*Grinter v. Union Pacific Railway Co.*, 23 Kas., 642). I, as a member of that Court, at the time of that decision, took part therein, and have no reason to doubt its correctness or its binding force on this Court."

In *Union Pacific Railway Co. vs. Kindred*, (43 Kas., 134, 135) the *Grinter case* was referred to with approval, and the Court held that:

> " Congress by the second section of the act of July 1, 1862, granted the right of way for the railroad through the Delaware Diminished Indian Reservation and agreed to extinguish as rapidly as might be the Indian title required for such right of way. This grant was for four hundred feet,—two hundred feet in width on each side of the railroad."

We, therefore, respectfully submit that the land in question was public land in 1862 within the meaning of the Act of Congress granting the

right of way to the Leavenworth Company; that this was the understanding of Congress and that it is conclusively shown to be so by the obligation assumed by Congress to extinguish the Indian title to "all lands falling under the operation" of the Act and "required for the said right of way"; that such conclusion necessarily results from the treaties with the Delawares when examined with due regard to the long established and peculiar relations of the United States and the Indians to the lands occupied by the latter; and that the Kansas courts have held this to be the law for over thirty years and that it has therefore become a rule of property in that State which cannot now be departed from.

SECOND POINT.

The Indians to whom the allotments were made under the treaty of 1860 (12 U. S. Stats., 1129) have already been paid for the right of way granted to the Leavenworth Company and they and their successors in title have no claim of any kind to the lands in question.

It will be remembered that by the last sentence of Article Three of the Delaware Treaty of 1860 it was agreed that the Leavenworth Company,

> " shall have a perpetual right of way over any portion of the lands allotted to the Delawares in severalty on the payment of a just compensation therefor in money to the respective parties whose lands are crossed by the line of railroad."

It will also be recalled that in the granting act of 1862, the United States agreed to—

> " extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way."

In pursuance of these two agreements by the United States, one with the Delaware Indians, and the other with the Leavenworth Company,

Congress appropriated money to pay those of the Delaware Indians whose lands were crossed by the right of way of the Leavenworth Company. The act of Congress, approved July 13, 1892 (27 U. S. Stats., 120, 126), made the following appropriation:

> "The sum of thirty-nine thousand and six hundred and seventy-five dollars and sixteen cents, of which ten thousand seven hundred and fifteen dollars and seventy-five cents shall be paid to individual members of the said tribes for improvements upon lands sold to the Leavenworth, Pawnee and Western Railroad Company under the provisions of the treaty with the Delaware tribe of Indians of date May thirtieth, eighteen hundred and sixty, in accordance with the concluding paragraph of article two of said treaty, and *twenty-eight thousand nine hundred and fifty-nine dollars and forty-one cents shall be paid to the individual members of said tribe through whose allotted lands the said Leavenworth, Pawnee and Western Railroad Company secured right of way, in accordance with the concluding clause of article three of said treaty of May thirtieth, eighteen hundred and sixty.*"

By this appropriation the United States kept faith with the Indians and saw that they were

paid a just compensation for the right of way as required by Article Three of the Treaty of 1860. At the same time, the United States kept faith with the railroad as agreed by the granting act of 1862, and extinguished the Indian right of occupancy to the land now in question.

Whatever rights may exist as between the United States and the Railroad Company, it is perfectly clear that the Indians through whose allotted lands the Leavenworth Company secured its right of way and their successors in title have no right or claim or title of any kind whatever to these lands. They have been paid in full, and by such payment their rights have been extinguished. They cannot keep both the money and the land. The Indian allottees having parted with the lands required for the right of way of the Leavenworth Company in consideration of the money paid to them therefor by the Government, the appellants, their successors in title, are as much bound thereby as if the Railroad had bought this right of way from them directly. We know of no answer to this proposition.

It is true that the appropriation of this money to pay the Delaware Indians for this right of way contains a proviso authorizing and directing

the Attorney General to institute the necessary legal proceedings against the Leavenworth Company, its successors or assigns, to recover the amounts to be found by the Department of the Interior to be due from the Leavenworth Company under the concluding clause of the third article of the treaty above quoted, which sums when recovered were to be used to reimburse the United States for the sum paid to the Indians for the right of way of the Leavenworth Company. As we have before suggested this is a matter between the United States and the Railroad Company and has no bearing of any kind whatever upon the right of the appellants to the land in question. Their rights are extinguished by the payment made to the Indians, their predecessors in title, by the Government under the Appropriation Act of 1892 of a just compensation for the right of way of the Leavenworth Company.

The general government in pursuance of this direction to the Attorney General brought suit to recover among other things the identical amount appropriated by the act of 1892, viz: $28,959.41, which it paid to the Indian allottees under the Treaty of 1860 in pursuance of the appropriation act (See appendix to brief, p. IV). To the bill

of complaint filed by the United States in the United States Circuit Court for the Eighth Circuit a demurrer was interposed by the Union Pacific Railroad Company, alleging among other things, that it appeared by the complainant's own showing that the United States was not entitled to the relief prayed for in the bill. The case was heard by Judge RINER who sustained the demurrer. No opinion was filed by him. An appeal was then taken by the United States to the Circuit Court of Appeals for the Eighth Circuit, which certified to this Court certain questions of law (*United States vs. U. P. Ry. Co.*, 84 Fed. Rep., 1022). No opinion was filed in the case by the Circuit Court of Appeals. This Court dismissed the certificate upon the ground that it was too general and required the Court to dispose of the whole case. The facts are fully set forth in the report of the case in this Court (*United States vs. Union Pacific Railway Co.*, 168 U. S., 505). The particular count in the bill which sought to recover the amount paid to the Indians for the right of way of the Leavenworth Company will be found at page 510.

Upon the return of the case to the United States Circuit Court of Appeals for the Eighth

Circuit the judgment of the lower court was affirmed without opinion.

It is immaterial how the matter stands between the Government and the Union Pacific. Their controversy under the clause of the Appropriation Act of 1892 directing the Attorney General to recover from the Union Pacific the amount paid by the United States to the Indians for the Leavenworth Company's right of way concerns them alone, and is of no importance to the appellants, but it is a matter of some interest to observe the history of the controversy between the Government and the Union Pacific above set forth, which resulted in the court's holding that under the granting act of 1862 the government was obligated to extinguish at its own expense any Indian title to the right of way of the Leavenworth Company and could not recover from the Union Pacific the amount paid to the Indian allottees under the Appropriation Act of 1892.

THIRD POINT.

No right of way by adverse possession has been acquired by the appellants or any of them to any portion of the right of way granted to the Leavenworth Company under the Act of July 1, 1862.

It is unnecessary to argue at length this proposition. It has been held by this Court more than once that a right of way granted by Congress to a railroad cannot be lost by adverse possession on the part of individuals. It has also been held that Congress alone was the judge of the width of the right of way required by the grantee corporation. Congress no doubt had in mind at the time of the grant in question that while at first the road might be a single-track road, yet in the future two tracks would be required, as is now the case, and eventually four tracks or more, which might easily necessitate a right of way of the width granted. Upon this point this Court said in *Northern Pacific Railroad Company vs. Smith*, 171 U. S., 260, 275:

> "By granting a right of way four hundred feet in width Congress must be understood to have conclusively determined that

a strip of that width was necessary for a public work of such importance."

The case just cited was quoted with approval by this Court in *Northern Pacific Railway Company vs. Townsend*, 190 U. S., 267, 272, where it was said:

"Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the

act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

The *Townsend case* has been referred to by this Court with approval many times. We therefore respectfully submit that the appellants have acquired no rights by adverse possession to the right of way involved in this case.

FOURTH POINT.

Equity has jurisdiction to protect a railroad company in the use and enjoyment of its right of way.

Aside from the unquestioned jurisdiction in this case of a court of equity to prevent a multiplicity of suits it is clear that, if we are right in the proposition argued in the preceding point that a railroad company cannot lose its right of way by adverse possession, then equity can step in and protect a railroad from interference when it undertakes to make use of a theretofore unused portion of its right of way. The Union Pacific has simply undertaken to relocate its tracks, remove its curves, reduce its grades, build new bridges and construct a second main track,

and in making these changes and improvements it has become necessary for it to use the entire width of its right of way. It was entitled to do this, and upon opposition from defendants it had the right to apply to a court of equity to restrain them from interfering with the use by it of its full right of way.

In the case of *Louisville & Nashville R. Co. vs. Smith* (128 Fed. Rep., 1), it appeared that the railroad company had "acquired an easement or right of way across the lands in question." It undertook to make certain improvements on its right of way and keep its track and roadbed in proper condition. Various persons, some fifteen in all, attempted to prevent this work being done. A bill was filed by the railroad company to enjoin the defendants from interfering with its use of its right of way. A demurrer was filed to the bill upon the ground that equity had no jurisdiction over such a suit. The demurrer was sustained in the court below, but on appeal to the United States Circuit Court of Appeals, for the Fifth Circuit, the case was reversed and the cause remanded with instructions to overrule the demurrer. The Court said at page 3 :

"It is unquestionably settled that equity has jurisdiction by injunction to prevent the interference with easements or their disturbance or destruction, actual or threatened. * * * It is shown by the bill that the defendants are denying the right of the complainant to the right of way and are insisting upon their right to cultivate the lands up to the ends of the cross-ties of the complainant's roadbed and track and are denying the complainant the right to go upon the lands included in its right of way for the purpose of reconstructing its roadbed and banks and cutting or repairing ditches therein as the same are needed in the proper maintenance and operation of the road. * * * These averments, taken in connection with the others in the bill, are amply sufficient to give a court of equity jurisdiction to protect the alleged rights of the complainant."

Again at page 6, it was said:

"Here the jurisdiction in equity as we have seen is not dependent alone on preventing a multiplicity of suits. There are other and distinct grounds for equitable interference. The complainant seeks by injunction to prevent an obstruction to and interference with its right of way under circumstances, as we have shown, that con-

> fer equity jurisdiction from the inherent nature of the case, aside from the fact that the interposition of the equity court may prevent a multiplicity of suits."

There is no difference in principle between the case cited and the case at bar. It is true that in the *Louisville and Nashville case* the right of way of the railroad was acquired by adverse possession, while in the present case it was acquired by a Congressional grant. How the right of way was acquired does not affect in any way the question of the protection of such right of way when once acquired and of its use and enjoyment by the railroad.

In *Cairo, V. & C. Ry. Co. vs. Brevoort* (62 Fed. Rep., 129) a suit was brought by the railroad company to restrain the construction of a levee across its right of way. The defendant demurred to the bill upon the ground that facts were not stated entitling the complainant to any equitable relief. The demurrer was overruled. In the course of its opinion the Court said at page 135:

> "An easement granted to a railway is essentially different from any other. The nature of railway service requires exclusive

occupancy. A railroad company is held to the highest degree of care, and the exercise of this care necessarily requires that it should have complete dominion over its right of way. It is bound to prevent obstructions from being placed on its tracks, and is required to keep them fenced in, and free from rubbish or other combustible materials. The duties of a railway company are due to the public as well as to individuals, and these duties it must perform at its peril. The rules which apply to the use of streets or highways fail, when applied to railroads, because the necessities of their use are different. The railroad must have the exclusive possession and control of the land within the lines of its location and the right to remove everything placed or growing thereon, which it may deem necessary to remove to insure the safe management of its road. * * * The construction of the levee as proposed would be a plain invasion of the complainant's exclusive rights. It follows from the foregoing considerations that the demurrer must be overruled."

In *Pennsylvania Railroad Co. vs. Freeport Borough* (138 Pa. St., 91) it appeared that the State of Pennsylvania had condemned a canal right of way through the Borough of Freeport. The canal

was used for a time and then the State of Pennsylvania conveyed the title to the canal to the Pennsylvania Railroad Company. The railroad filled in the canal and used it as a railroad right of way. The citizens of Freeport used a portion of this right of way as a thoroughfare and such use was open and notorious for a sufficient length of time to give title by adverse possession if it had been possible to obtain title to a railroad right of way by adverse possession. The railroad company finding it necessary to enlarge its facilities started to construct an additional track upon that portion of its right of way which had been used by the public of Freeport as a thoroughfare.

The Borough authorities of Freeport took forcible measures to prevent the railroad from laying the track as proposed. The situation is thus stated in the opinion at page 93 :

> "In the course of the operating of said railroad it is alleged by the company that the demands of the increasing passenger and freight traffic have made it necessary to lay an additional track through said borough on the eastern side of the existing track. A portion of the bed for said track has already been prepared and

workmen have been engaged in prosecuting this work, until by the recent action of the borough authorities of Freeport, forcible measures have been employed to hinder and prevent the railroad operatives from laying the track as proposed."

The railroad company filed a bill in equity to prevent any interference with its work upon the part of the Borough authorities and the prayer for an injunction was granted. In the course of the opinion it was said at page 95 :

"Now, whilst the canal was in operation, the necessities for the alley were in part supplied by the consentable use and enjoyment of the towing-path between those streets, but this enjoyment was only permissive. The towing-path between the two streets also occupied the site of the alley, at least in part. The railroad company have also permitted the public to enjoy at least so much of the ground outside of these tracks as has not been required heretofore in the operation of their road. But the railroad company have been in actual occupancy of the ground so far as it has been necessary. It has never disclaimed ownership to any part of the ground it now seeks to use and to which it clearly has title. Must it

be assumed that in order to maintain its title it must cover its whole extent of right of way with tracks or other erections? It is well understood that the ordinary right of way for railroad lines is sixty-six feet in width. In only a few instances in the State can it be shown that this extent of ground has been occupied by continuous tracks, and yet is it ever true that the railroad company has lost its right to the ground adjacent to its tracks on either side by such an omission to occupy? The nature of such thoroughfares and public highways as railroads must be taken into consideration. They are, perhaps to a larger extent than anything else in modern years, developing agencies, tending largely to develop business and increase population. With this increase of population and of business, facilities only contemplated at the beginning, but not completed, have to be provided from time to time to meet the public demands. Hence, it would be unreasonable to hold that the mere nonuser of a part of a railroad location, side by side with the part in actual continuous use, and embraced in the original grant, would revert to the public simply because the public had enjoyed a permissive, not a hostile, use of this contiguous ground. We think

the construction of a track or tracks upon a part of the location throughout its length is the best assertion of right to the entire width that could, in the nature of railroad construction and operation, be demanded. By the side of every railroad track extending throughout the country beaten paths may everywhere be found daily used and traveled upon by the public, and enjoyed as the easiest and most convenient thoroughfare ; for such in reality they become. And yet the thought is never entertained that the public, by the most constant and continuous use of such ground, acquires an indefeasible title to it. The reason is palpable. The presence of the railroad tracks constantly in use is the defiant badge of ownership. It is the only practical assertion of title that can be made. The rule does not differ because the location of a road is through a more populous district,— in this case through a borough whose citizens have availed themselves of the convenience of using the ground along the railroad track notwithstanding the railroad ties and rails of the company may not have spanned and bound literally with an iron grasp from one side to the other its authorized domain."

There is no difference between this *Pennsylvania case* and the case at bar. The facts are essentially the same, and there would seem to be no doubt that the court below in the present case was right in its conclusion that, under the circumstances, equity had jurisdiction to protect the Union Pacific in the use and enjoyment of its right of way. On this point the Court said at page 70 of the Record :

> " It was conclusively determined by the act of Congress that a right of way four hundred feet in width was essential to the performance of the public duties assumed by the grantee upon its acceptance of the grant. No part of that right of way could be alienated without the consent of Congress nor lost by laches or acquiescence. *Northern Pacific v. Smith*, 171 U. S., 260; *Northern Pacific v. Townsend*, 190 U. S., 267; *Northern Pacific v. Ely*, 197 U. S., 1. It became in a sense a national public highway, and private encroachments upon it could be neither strengthened nor confirmed by lapse of time. Possession of portions thereof by individuals was not adverse in the sense that it might ripen into title, nor, however long it was permitted to continue, did it preclude the railroad company from performing its duty by asserting its right thereto when-

ever the necessity for the full use arose. That for a long time it maintained its right of way fences within the exterior limits of the strip gave the adjacent land owners nothing more than a permissive use of the unenclosed portions, and when it became inconsistent with the public use to which the right of way was dedicated by Congress the railroad company properly removed its fences and resumed possession. Under such circumstances it cannot be said, when it applied to a court of equity to protect the right of way from continued encroachments, that it came with unclean hands. The title of the railroad company, which is said to be that of a limited fee, *Northern Pacific v. Townsend*, *supra*, is not so dissimilar from an easement as to render inapplicable the remedy appropriate to the latter."

FIFTH POINT.

The judgment of the Court below should be affirmed.

MAXWELL EVARTS,
Of Counsel for Appellee.

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APPENDIX.

Section 2 of Granting Act of July 1, 1862 (12 U. S. Stats., 491).

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops and depots, machine shops, switches, side tracks, turntables and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

Section 9 of Granting Act of July 1, 1862 (12 U. S. Stats., 493).

SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee and Western Railroad Company of Kansas is hereby authorized to construct a railroad and telegraph line, from the Missouri River, at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri River to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas River, as aforesaid, and the aforesaid point, on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, pro-

vided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hundredth meridian of longitude west from Greenwith, in the territory of Nebraska. The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

Bill of Complaint in Suit Brought By the United States to Recover Amount Paid to the Delaware Indians For the Right of Way of the Leavenworth Company. The portion of interest is at p. XV. et seq. The Case in this Court is Reported in 168 U. S., p. 505.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff, vs. THE UNION PACIFIC RAILWAY COMPANY and S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, F. R. COUDERT and JOHN W. DOANE, as Receivers of the Union Pacific Railway Company, Defendants.	Petition.

Come now the United States of America by Richard Olney, Attorney General of the United States, and W. C. Perry, United States Attorney for the District of Kansas, and say that the

above named defendant, the Union Pacific Railway Company is a corporation duly organized and existing under and by virtue of the laws of the United States; that S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert and John W. Doane are the duly appointed and acting Receivers of the said Union Pacific Railway Company, and that the matter in dispute herein exceeds the sum or value of ten thousand dollars, exclusive of interest and costs, and for a first cause of action against said defendants, state:

That in the year one thousand eight hundred and thirty-one and for a long time prior thereto, plaintiffs were the owners in fee simple of all the lands lying north of the Kansas and west of the Missouri rivers in the then territory of Kansas; that by terms of a treaty made between said plaintiffs and the Delaware Nation of Indians, proclaimed on the 24th day of March, 1831, the said plaintiffs conveyed and secured to the said Delaware Nation of Indians as a permanent home for the said Nation, the country in the fork of the Kansas and Missouri rivers, extending up the Kansas River to the Kansas line and up the Missouri River to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide north of the Kansas boundary line for an outlet; that afterwards in the year 1854, by the terms of a treaty by and between said plaintiffs and said Delaware

Nation of Indians, the said Delaware Nation of Indians ceded to said plaintiffs all their right, title and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, and also their right and interest in and to the outlet mentioned in the treaty hereinbefore set forth, excepting that portion of the said country sold to the Wyandotte tribe of Indians by instruments sanctioned by an Act of Congress approved July 25, 1848; and also excepting that part of said country lying east and south of a line beginning at a point on a line between the land of the Delaware and half breed Kansas forty miles in a direct line west of the boundary between the Delaware and Wyandotte; thence north ten miles; thence in an easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri River where the usual high water line of said creek intersects the high water line of the said river.

That said plaintiffs further aver that said treaty, among other things provided as follows:

> "ARTICLE 11. At any time hereafter, when the Delawares desire it, and at their request and expense, the President may cause the country, reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person

or family as shall be designated by the principal men of the tribe; provided such assignment shall be uniform.

"ARTICLE 12. In the settlement of the country adjacent to the Delaware reservation, roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law, shall have a right of way through the reserved lands, on the same terms that the law provides for their location through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have a right of way, on payment of a just, compensation therefor in money."

That afterwards, as provided for in said treaty, the said Delaware Nation of Indians represented to plaintiffs that it was their wish that a portion of the lands reserved for their homes might be divided among them in the manner contemplated by the 11th article of said treaty, as hereinbefore set forth, and thereupon, by the terms of a treaty made and entered into between said plaintiffs and the said Delaware Nation of Indians, concluded May 30th, 1860, it was provided, among other things, as follows:

"The Delawares have represented to the government that it is their wish that a portion of the lands reserved for their home may be divided among them in the manner contemplated in the 11th article of the treaty

aforesaid, it is hereby agreed by the parties hereto that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner as the public lands are surveyed, and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable a reasonable portion of timber, to be selected according to the legal sub-divisions of survey."

Said treaty further provides by the last clause of section 2 thereof, that:

> "The improvements of Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building their homes on the lands retained."

It was further provided in article 3 of said treaty that as to the remaining lands, after the tracts in severalty and those tracts for special objects named in said treaty, had been selected and set apart, that The Leavenworth, Pawnee and Western Railroad Company, a corporation then organized and existing under and by virtue of the laws of the Territory of Kansas, should have the prior right of purchase upon the payment into the United States Treasury of the sum

therein provided, which payment it was provided by said treaty should be made within six months after the quantity of said land was ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior should appraise to be the value, and providing that such value should not be placed below the value of one dollar and twenty five cents per acre, exclusive of the cost of survey; it was further provided in article 3 of said treaty that the United States would issue a patent in fee simple directly to said company upon the payment as provided in said treaty; and the said article three further provides:

> "It is therefore agreed by the United States that the wishes of the Delawares shall be granted; that they will accept the trust reposed upon them, and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the 7th and 8th articles of the Delaware treaty of sixth May, one thousand, eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances; it is also agreed that said railroad company shall have a perpetual right of way over any portion of the lands allotted to the Delaware in severalty, on the payment of a just compensation therefor in money to the respective parties whose lands are crossed by the line of railroad."

By the terms of said treaty these plaintiffs became and were and still are the trustees of said Delawares for all of the purposes therein provided; that the said Leavenworth, Pawnee and Western Railroad Company prior to the year 1861, accepted the terms of said treaty and agreed to purchase the unallotted lands of said Delawares and to pay for said lands and the improvements thereon under and in accordance with the provisions and terms set forth in said treaty, and all of the rights of said railroad company in and to said lands and its liability for said lands and said improvements, and all the rights and liability of its grantee, successor and assignee, the said defendant the Union Pacific Railway Company, were fixed by the terms of said treaties, and the said Leavenworth Pawnee and Western Railroad Company and its grantee, successor and assignee, the defendant the Union Pacific Railway Company, took such lands subject to the conditions set forth in said treaties as to the payment therefor, and as to the payment for said improvements thereon; that as provided in article 3 of said treaty plaintiffs herein on the 26th day of October, 1860, appointed three commissioners to inspect and appraise the value of all the lands and improvements which the said Leavenworth, Pawnee and Western Railroad Company had by the terms of said treaty become entitled to purchase, and said commissioners so appointed under the provisions of said

treaty appraised such improvements then known, at the sum or value of nine thousand five hundred and thirty-four dollars and twenty-five cents, which appraisement was returned on or about the 23rd day of February, 1861; and plaintiffs say that a schedule of said appraisement showing the improvements with their location and the value thereof is set forth in page numbered one (1) of exhibit A attached to this petition, which is hereby made a part hereof, and to which reference is hereby made, to be read here the same as if fully set forth herein; and plaintiffs say that at the time of said appraisement of said improvements, and at the time of the said purchase of said land by the Leavenworth, Pawnee and Western Railroad Company, there were then other improvements on said land not included in said appraisement, but which afterward on or about the day of 18 , were appraised as provided in the last clause of art. 2 of said treaty of May 30th, 1860, at the sum of eleven hundred, eighty-one and 50/100 dollars; an itemized statement of said improvements which are not included in said first appraisement, is set forth on pages marked C of Exhibit A, which are hereby made a part hereof.

And plaintiffs further say that the said Leavenworth, Pawnee and Western Railroad Company was unable to carry out the terms of the purchase of said lands and said improvements as

provided in the treaties hereinbefore set forth, to pay for the same in gold and silver coin as in said treaty provided, and that afterwards a further treaty was made and entered into by and between plaintiffs and the said Delaware Nation of Indians on or about July 2, 1861, and ratified August 6th, 1861, and which in terms referred to the provisions of said sale of lands and improvements in the treaties hereinbefore set forth, by which last mentioned treaty it was provided that said Leavenworth, Pawnee and Western Railroad Company might execute its bonds with interest warrants or coupons attached according to the forms in said last named treaty provided; the principal sum of said bonds to be in the aggregate $286,742.15, and to execute a mortgage upon one hundred thousand (100,000) acres of land contemplated in and by said treaty as set forth in a letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated May 29th, 1861, said mortgage to be conditioned for the payment of said bonds, both principal and interest, said bonds and said mortgage being executed by said railroad company in lieu of said gold and silver coin, for the reason, as set forth in said treaty, that said railroad company was not able to pay said sum of money within the time as provided therein; but no provision was made in said last mentioned treaty for any change in the time or manner of the payment for said improvements as herein set forth; and the said bonds and mortgage were made, executed

and delivered to secure the payment of the purchase price of said lands, only exclusive of the value of said improvements, and the amount provided for and included in said mortgage did not cover or include said improvements.

That afterward through changes in the name of the said Leavenworth, Pawnee and Western Railroad Company, and through a consolidation by and with other railroad companies, the defendant the Union Pacific Railway Company succeeded to all the franchises, property, rights and interests of the said Leavenworth, Pawnee and Western Railroad Company and became and is subject to all the liabilities of said company under and by virtue of the said several treaties, and under and by virtue of the purchase of the said Delaware Indian lands and the improvements thereon as hereinbefore set forth; that thereafter by the terms of a treaty entered into on the 4th day of July, 1866, which treaty was ratified on or about the 26th day of July, 1866, in article first thereof, it was provided:

> "That the United States shall secure and cause to be paid to the said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee and Western Railroad Company according to the terms of a treaty ratified August 22d, 1860, and supplemental treaties, and in accordance with the conditions, restrictions and limitations thereof."

Plaintiffs further say that by the terms of said treaty they became and were sureties for the payment of the value of said improvements, and that by the provisions of the treaties hereinbefore set forth and referred to said plaintiffs were and are the trustees for said Delaware Indians to collect and dispose of said money as provided in said treaties.

And these plaintiffs further say that neither said Leavenworth, Pawnee and Western Railroad Company, nor any of its assignees or successors, nor the Union Pacific Railway Company, nor the Receivers, the defendants herein, have paid for any of said improvements on the said lands as hereinbefore set forth, and that the same remains due and wholly unpaid, so far as said Leavenworth, Pawnee and Western Railroad Company, its successors and assigns and the said Union Pacific Railway Company and the other defendants, the said receivers, are concerned.

And these plaintiffs further say that by an act of Congress duly passed and approved on July 13th, 1892, there was appropriated and paid to said Delaware Indians the sum of $10,715.75, which sum these plaintiffs paid to said Delaware Indians as surety under the provisions of said treaties, as hereinbefore set forth, and in discharge of its trust created in and by said several treaties with said Delaware Indians as hereinbefore set forth.

And these plaintiffs further say that

by the terms of said treaties and by the acceptance thereof by the said Leavenworth, Pawnee and Western Railroad Company and its grantee, successor and assignee, the defendant the Union Pacific Railway Company the said defendant the Union Pacific Railway Company became and is liable to these plaintiffs as said sureties and trustee, for money paid out and expended on behalf of said defendants for said improvements as hereinbefore set forth and described, in the said sum of $10,715.75, which sum, together with interest thereon at seven per cent. from the 30th day of May, 1860, and is now due and wholly unpaid.

II. Plaintiffs for a second cause of action against the defendants, state that by the terms of a treaty by and between these plaintiffs and the Delaware Nation of Indians in the year 1854, and subsequent treaties, as set out in plaintiff's first cause of action herein, to which reference is made, and the allegations therein as to said treaties are hereby made a part hereof the same as if fully set forth herein, the said Leavenworth, Pawnee and Western Railroad became and was entitled to a right of way across the reservation of said Delaware Indians in the then Territory of Kansas, and across the lands subsequently allotted in severalty to said Delawares, upon the payment of a just compensation therefor for said right of way.

And these plaintiffs further say that by the

provisions of said treaties plaintiffs became and still are the trustees for said Delaware Indians to collect the purchase price for their lands sold under the provisions of said treaties and to collect and pay out in accordance with the provisions of said treaties the amount due and owing for the right of way for said railroad company; and by the provisions of the treaty of 1866, by the first article thereof, as set out in plaintiff's first cause of action, which allegation in said first cause of action as to said treaty is hereby made a part hereof, these plaintiffs became and are sureties of the Leavenworth, Pawnee and Western Railroad Company and their successors and assigns, the defendant herein the Union Pacific Railway Company, for the payment of the amount due and owing for said right of way.

Plaintiffs further say that the said Leavenworth Pawnee and Western Railroad Company in pursuance of the provisions of said treaty and under and by virtue of the authority thereof, and subject to the liabilities and conditions therein provided, did select and lay out a right of way and construct a railroad thereon over and across the reservation of said Delaware Indians, and over and across certain pieces and parcels of lands allotted in severalty to said Indians, as hereinbefore set forth, and under and by virtue of the provisions of said treaty, said Leavenworth, Pawnee and Western Railroad Company became and was liable to these plaintiffs as trus-

tees of said Delaware Indians, for the damage to said lands by reason of said right of way.

And these plaintiffs say that the lands allotted in severalty that were crossed by said right of way, with the items of damage thereto and the amount of land taken in each several parcel or tract of land so crossed by said right of way, with the names of the allottees of said land, is set out in pages numbered consecutively from two to forty of exhibit A attached hereto, which are hereby made a part hereof.

These plaintiffs say that the reasonable damages by reason of said right of way across said allotted lands as hereinbefore stated, and a reasonable compensation therefor was and is the sum of $28,959.41; that the value of said lands so taken by said right of way by the said Leavenworth, Pawnee and Western Railroad Company, with damages to said Delaware Indians by reason thereof, was duly appraised by a commissioner duly appointed by the plaintiff herein as provided in said treaties; a copy or schedule of said appraisement is hereto attached as a part of exhibit A, being pages one to forty consecutively of said exhibit A, which are hereby made a part hereof and to which reference is made to be read here; that afterwards, through changes in the names of the said Leavenworth, Pawnee and Western Railroad Company, and through a consolidation by and with other railroad companies, the defendant the Union Pacific Railway Com-

pany succeeded to all the franchises, property, rights and interests of the said Leavenworth, Pawnee and Western Railroad Company, and became and is subject to all the liabilities of said company under and by virtue of the said several treaties and under and by virtue of the purchase of the said Delaware Indian lands and the improvements thereon, as hereinbefore set forth ; that neither of the said defendants has ever paid the said Delaware Indians or to these plaintiffs the amount due for said right of way ; that by reason of the terms of said treaties and by reason of the trust there imposed and accepted by plaintiffs, and by reason of the acceptance of said terms by the said Leavenworth, Pawnee and Western Railroad Company and its successor, grantee and assignee, the defendant the Union Pacific Railway Company, the said defendant became and still is liable to these plaintiffs for said right of way and the damages growing out thereof.

And these plaintiffs say that by the provisions of the act of Congress passed and approved July 13th, 1892, plaintiffs appropriated and paid out to said Indians the sum of $28,959.41, for said right of way for and on behalf of the defendant the Union Pacific Railway Company, and in accordance with the provisions of article one of the treaty of July 4th, 1866, by and between the said Delaware Indians and these plaintiffs, whereby these plaintiffs became and were sure-

ties for the payment of the amount due and owing from the defendant the Union Pacific Railway Company as compensation for said right of way and the damages growing out therefrom, by all of which the said defendant the Union Pacific Railway Company became and is indebted to these plaintiffs in the said sum of $28,959.41 with interest at the rate of seven per cent from January 1st, 1863, which sum is now due from said defendant to these plaintiffs and is wholly unpaid.

III. Plaintiffs for a third cause of action against the defendants, state that on or prior to the year 1860 plaintiffs were the owners in fee simple, of the lands lying north of the Kansas and west of the Missouri rivers, subject to the right of occupation by certain Indian tribes, among which was the Delaware nation of Indians; that through and by the terms of several treaties by and between these plaintiffs and the Delaware nation of Indians, as set out in the plaintiff's first and second causes of action, and which allegations as to said treaties are hereby referred to and made a part hereof as if fully set forth herein, and by an agreement by and between these plaintiffs and the Leavenworth, Pawnee and Western Railroad Company, the said Leavenworth, Pawnee and Western Railroad Company became and was entitled to a right of way over certain pieces and parcels of land belonging to these plaintiffs upon the payment of just com-

pensation therefor; that the said Leavenworth, Pawnee and Western Railroad Company, on or about the year 1860 in pursuance of the provisions of said several treaties and under and by virtue of said agreement with these plaintiffs, did select and lay out a right of way and construct a railroad thereon, over, upon and across certain pieces of land belonging to these plaintiffs and promised and agreed to pay these plaintiffs a reasonable compensation therefor; a copy or schedule of the lands thus crossed by said Leavenworth, Pawnee and Western Railroad Company by said right of way, is set forth in pages numbered from 2 to 40 consecutively, of Exhibit A, and hereto attached and hereby made a part hereof. Plaintiffs further say that the lands thus taken and occupied by the said Leavenworth, Pawnee and Western Railroad Company at the time of said taking were and still are of the reasonable value of $28,959.41; that afterwards, through changes in the name of the said Leavenworth, Pawnee and Western Railroad Company and through a consolidation by and with other railroad companies, the defendant, the Union Pacific Railway Company succeeded to all the franchises, rights and interests of said Leavenworth, Pawnee and Western Railroad Company, and became and is subject to all the liabilities of said company under and by virtue of the several treaties under and by virtue of the purchase and occupancy of said

right of way; that the amount of said purchase price for said right of way is long past due and remains wholly unpaid, and that there is due therefor from the defendants herein to these plaintiffs the sum of $28,959.41 with interest at seven per cent per annum from January 1st, 1860.

Wherefore plaintiffs pray for judgment against said defendants in the sum of $39,675.16, with interest thereon from January 1st, 1860, and for costs of suit.

RICHARD OLNEY,
Attorney General.
W. C. PERRY,
United States Attorney.

KINDRED *v.* UNION PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 51. Argued November 9, 1911.—Decided June 10, 1912.

Under § 2 of the act of July 1, 1862, 12 Stat. 489, c. 120, and other provisions of that act, the predecessor in title of the Union Pacific Railroad Company acquired a right of way four hundred feet in

width across the lands in Kansas, within the Delaware Diminished Indian Reservation, those lands having been assigned in severalty to individual Delawares under the treaty of May 30, 1860, 12 Stat. 1129, providing for such right of way.

Quære. Whether the individual Delaware Indians, to whom the lands were assigned under the treaty of 1860, obtained a better or different right in them than the tribe had in the lands in common.

Quære. Whether under § 2 of the act of July, 1862, the United States, in extinguishing the Indian title to lands through which the railroads were given rights of way, is to bear the burden by compensating the Indians, or only by assisting in the negotiations.

While the phrase "public lands" is a term ordinarily used to designate lands subject to sale under general laws, it is sometimes used in a larger sense, and as used in § 2 of the act of July, 1862, it includes lands within Indian reservations. Congress so intended and such has been the construction placed on the words by the Interior Department.

Where an Executive Department has constantly given the same construction to a statute affecting title to real estate, rights acquired thereunder will not be lightly disturbed after a lapse of many years.

Purchasers of land, over which a railroad has been constructed and operated, cannot claim that they purchased without notice of the claim of the railroad to own the right of way.

Where a railroad company enters upon the land of another and constructs a railroad thereover, under a statute entitling it to do so on condition that compensation be made to the owner, and the latter permits the construction and operation of the railroad without compliance with that condition, a subsequent vendee of the owner takes the land subject to the burden of the right of way, and the right to exact payment therefor from the railroad company belongs to the owner at the time of entry and construction.

168 Fed. Rep. 648, affirmed.

THE facts, which involve the right of the Union Pacific Railroad Company to certain portions of its right of way within the Delaware Diminished Reservation, are stated in the opinion.

Mr. Edward D. Osborn, with whom *Mr. A. M. Harvey* and *Mr. Frank Doster* were on the brief, for appellants:

Congress had no power to grant a right of way through

the lands in question. See treaty proclaimed March 24, 1831, 7 Stat. 357; treaty of 1854, 10 Stat. 1048; treaty of 1860, 12 Stat. 1129.

The design of the treaty of 1854, as accomplished by the treaty of 1860, was to vest the individual Delawares with a property right in the lands allotted to them in severalty. The quality of descendibility to successors was imparted to the land. There was, as in all land treaties with Indians, an understood, even if unexpressed, intent to educate the Indians into the habits of civilized life by individual ownership instead of communal occupancy. A full equitable title to the allotted lands became vested in the individual Delawares. *Jones* v. *Meehan*, 175 U. S. 1; *Francis* v. *Francis*, 203 U. S. 233.

Where a grant is made to one "and his heirs" a restriction on alienation either partial or entire does not debase the grant to a mere right of occupancy, but a vested interest passes thereby under the cover and protection of the constitutional guaranties of property right. *Libby* v. *Clark*, 118 U. S. 250; *United States* v. *Paine Lumber Co.*, 206 U. S. 467; *S. C.*, 154 Fed. Rep. 263; *United States* v. *Cook*, 19 Wall. 591; *Shiver* v. *United States*, 159 U. S. 491.

As an Indian allottee's interest in the land is a vested property right, Congress is lacking the power to make a grant through it of a railroad right-of-way without making provision for compensation therefor. *Jones* v. *Meehan*, 175 U. S. 1; *Cherokee Nation* v. *Southern Kansas R. R. Co.*, 135 U. S. 641.

The act does not purport or intend to grant a right-of-way through the lands in question, but only "through the public lands." At the time of its enactment the lands involved were not public lands nor were they merely lands conceded and guaranteed to the Indians as a perpetual home by express treaty; they had but a few months before been allotted in severalty to the individual members of the tribe. The question is not, "Could Congress grant

the right-of-way over these lands?", but "Did Congress do so?"

Congressional grants of land are not to be regarded as including lands which have been reserved or appropriated by the United States for any purpose whatever, even though they be not expressly excepted by the language of the grant. *L. L. & G. R. Co.* v. *United States*, 92 U. S. 733; *M., K. & T. Ry. Co.* v. *United States*, 92 U. S. 760; *Beecher* v. *Wetherly*, 95 U. S. 717; *Spokane Falls & N. Ry. Co.* v. *Ziegler*, 61 Fed. Rep. 392; *United States* v. *Sioux City Ry. Co.*, 46 Fed. Rep. 502; *Scott* v. *Carew*, 196 U. S. 100.

Grants of lands or rights out of the "public lands" are to be construed as excluding lands otherwise reserved or appropriated, unless a contrary intent is clearly and positively expressed. *Wilcox* v. *Jackson*, 13 Pet. 498; *Bardon* v. *Nor. Pac. R. Co.*, 145 U. S. 535; *Northern Lumber Co.* v. *O'Brien*, 71 C. C. A. 598; 139 Fed. Rep. 614, affirmed, 204 U. S. 190.

To give the act of July 1, 1862, the effect contended for by the appellee is to abrogate the treaty of 1860 with the Delaware Nation. A treaty of the United States, whether made with a foreign nation or with an Indian tribe, has the force of law equally with an act of Congress. Congress may abrogate such treaties, as it may repeal statutes, but in neither case is repeal or abrogation by implication favored. Unless the intent of Congress to abrogate the treaty is clear and undoubted from the language of the act, unless it admits of no other reasonable construction, it will not be construed as abrogating the treaty. *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Gue Sim*, 176 U. S. 459; *Ward* v. *Race Horse*, 163 U. S. 459; *Cope* v. *Cope*, 137 U. S. 682; *Turner* v. *American Missionary Union*, 5 McLean, 349.

The courts of the United States have uniformly held that grants of public lands to railways do not apply to Indian reservations, even though such reservations be not

expressly excepted from the grant. *L. L. & G. R. Co.* v. *United States*, 92 U. S. 733; *Bardon* v. *Nor. Pac. R. Co.*, 145 U. S. 535; *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *A. & P. R. Co.* v. *Mingus*, 165 U. S. 413; *King* v. *McAndrews*, 111 Fed. Rep. 860; *United States* v. *Oregon Military Road Co.*, 103 Fed. Rep. 549, 554; *Nor. Pac. R. Co.* v. *Maclay*, 61 Fed. Rep. 554. *M., K. & T. Ry. Co.* v. *Roberts*, 152 U. S. 114, is not in conflict with this doctrine.

This rule of construction applies to right-of-way grants. *Washington & I. R. Co.* v. *Osborn*, 160 U. S. 103; *Union Pac. R. Co.* v. *Harris*, 215 U. S. 386.

Appellee's authorities do not support its contention that a different rule of construction is applicable to right-of-way grants. See *Railroad Co.* v. *Jones*, 177 U. S. 125; *Bybee* v. *Oregon Ry. Co.*, 26 Fed. Rep. 586.

The extinguishment clause is not an adequate expression of the intent of Congress to deprive the Indians of a part of the land that had been set apart and granted for their separate perpetual use, and to give it to the railroad company. *Atl. & Pac. R. Co.* v. *Mingus*, 165 U. S. 413.

The generally accepted construction put upon such extinguishment clauses is that its effect is to extend the grant to wild, unceded Indian lands occupied by the Indians under their original right of occupancy, but not to lands expressly reserved for their occupation or use by treaty. *Buttz* v. *Nor. Pac. R. Co.*, 119 U. S. 55; *Caldwell* v. *Robinson*, 59 Fed. Rep. 653; *L. L. & G. R. Co.* v. *United States*, 92 U. S. 733; *Nor. Pac. R. Co.* v. *Hinchman*, 53 Fed. Rep. 523.

This is the settled ruling of the Department of the Interior as to the similar extinguishment clause in the Northern Pacific grant. *Dillone* v. *Nor. Pac. R. R. Co.*, 16 Land Dec. 229; *Nor. Pac. R. Co.* v. *Warren*, 28 *Id.* 494; *Warren* v. *Nor. Pac. R. Co.*, 22 *Id.* 568; *Nor. Pac. R. Co.* v. *Eberhard*, 19 *Id.* 532; *Nor. Pac. R. Co.* v. *Haynes*,

20 *Id.* 90; *Nor. Pac. R. Co.* v. *Maclay*, 26 *Id.* 43; *Nor. Pac. R. Co.* v. *Clark*, 5 *Id.* 138; *Whitney* v. *Nor. Pac. R. Co.*, 1 *Id.* 343; *Phelps* v. *Nor. Pac. R. Co.*, 1 *Id.* 368; *William P. Maclay*, 2 *Id.* 675; *Atl. & Pac. R. Co.*, 13 *Id.* 373; *Atl. & Pac. R. Co.* v. *Tiernan*, 17 *Id.* 587.

The construction given to a statute by those charged with its execution has much weight and ought not to be overruled without cogent reasons. The decisions of the Department of the Interior in regard to the construction and effect of statutes relating to congressional grants of the public domain, especially when followed consistently for many years, will be accepted by the courts as correct, unless obviously wrong. *United States* v. *Hammers*, 221 U. S. 220; *United States* v. *Moore*, 95 U. S. 760; *Edwards* v. *Darby*, 12 Wheat. 206; *United States* v. *Burlington R. R. Co.*, 98 U. S. 334; *Brown* v. *United States*, 113 U. S. 568; *Hewitt* v. *Schultz*, 180 U. S. 139; *St. Paul, &c. R. Co.* v. *Phelps*, 137 U. S. 528; *Hastings, &c. R. Co.* v. *Whitney*, 132 U. S. 357; *McFadden* v. *Mountain View Min. Co.*, 37 Fed. Rep. 670.

The predecessors in title of the appellee accepted the benefits of the act of July 1, 1862, and thereby became subject to its limitations, as well those upon the original grant of July 1, 1862, as those upon the grants contained in the amendatory act itself. See *Humbird* v. *Avery*, 195 U. S. 480; *Heydenfeldt* v. *Davey G. & S. Mining Co.*, 93 U. S. 634.

By accepting an additional grant of powers or franchises, a corporation becomes subject to new restrictions imposed by the granting act. *St. Paul Ry. Co.* v. *Chadwick*, 6 Land Dec. 128; *St. Paul R. Co.* v. *Moling*, 7 *Id.* 184; *St. Paul R. Co.* v. *Thompson*, 10 *Id.* 507.

By "Government reservation" is obviously meant any public land reserved by the Government for any special use. Indian reservations are undoubtedly included within the meaning of the term. *Leavenworth, L. & G. R. Co.* v.

United States, 92 U. S. 733; *Hot Springs Cases* (*Rector* v. *United States*), 92 U. S. 698; *A. & P. R. Co.* v. *Mingus*, 165 U. S. 413; *Cohn* v. *Barnes*, 5 Fed. Rep. 326, 331; *Rio Verde Canal Co.*, 27 Land Dec. 421.

Mr. Maxwell Evarts for appellee:

At the time of the Pacific Railroad Act of July 1, 1862, the Delaware Indians were the wards of the Nation and had only a right of occupancy to the lands in the Delaware Reservation, and such lands were at the time public lands of the United States within the meaning of the second and ninth sections of said act of 1862.

Moreover, the policy of the General Government has always been that the United States, and the United States alone, should have dealings with the Indians—its wards. Neither the railroads nor individuals were permitted to extinguish, by purchase or in any other way, any right of occupancy which the Indians might have in the lands of the United States. For this reason, therefore, such lands must be deemed to be public lands, so far as the people of the United States are concerned, with the right in the Government alone to extinguish the Indian title whenever such lands were necessary for purposes other than the occupancy thereof by the Indians. *Johnson* v. *M'Intosh*, 8 Wheat. 543, 585; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; *Jones* v. *Meehan*, 175 U. S. 1, 8.

The expression "Indian title" is perhaps misleading, and was not intended to convey the idea that the Indians had title to their lands in the usual meaning of the term, but only a right to live on them, subject to whatever disposition the United States might see fit to make of them. *Veale* v. *Maynes*, 23 Kansas, 1, 23; *Cherokee Nation* v. *Georgia*, 5 Pet. 1.

To understand the peculiar relations of the United States and of the Indians to the wild lands of the country, the treaties with the Delawares must be considered. See

treaties of January 21, 1785, 7 Stat. 16, 17; of January 9, 1789, 7 Stat. 28, 29; of 1795, 7 Stat. 49; of September 29, 1817, 7 Stat. 160; of September 17, 1818, 7 Stat. 178; of October 3, 1818, 7 Stat. 188; of September 24, 1829, 7 Stat. 327; May 6, 1854, 10 Stat. 1048; May 30, 1860, 12 Stat. 1129.

The treaties in *Veale* v. *Maynes*, (23 Kansas) with the Pottawatomie Indians were substantially the same as the treaties with the Delaware Indians, and the question then before Mr. Justice Brewer was precisely the question which is now presented to this court.

The Pottawatomie Treaty of 1867, 15 Stat. 531, is practically similar to the Delaware Treaty of 1866, 14 Stat. 793.

Mr. Justice Brewer held that the allotment of the land to the Pottawatomie Indians under the Treaty of 1861 made no change in the relation of the Indians of that Tribe to the land in controversy, except that the land instead of being held in tribal occupancy was to be held in personal or individual occupancy, and that no enlargement of the right of the Indians to occupy the land was to be found until the right to a patent in fee simple was given to them under the treaty of 1867.

The argument of Mr. Justice Brewer in the *Veale Case* is precisely the argument of appellees, that the Delaware Indians had no other, further or greater right to their lands by reason of the Treaty of 1860 than they had before.

The treaties with the Delaware Tribe show that up to the time of the Pacific Railroad Act of 1862 the Delawares had no claim whatever to the land in question except a right of occupancy at the will of the United States. See Ninth Article, Treaty of July 4, 1866, 14 Stat. 793, 796.

The question, however, of the right of the Leavenworth Company and its successors to the right of way across the lands of the Delawares is no longer open for determination

under the language of the treaties, but has long since become an established rule of property in the State of Kansas, under the decisions of its highest court. *Grinter* v. *Kan. Pac. Ry. Co.*, 23 Kansas, 642; *State* v. *Horn*, 34 Kansas, 556; *S. C.*, 35 Kansas, 717; *Union Pacific Ry. Co.* v. *Kindred*, 43 Kansas, 134, 135.

The Indians to whom the allotments were made under the treaty of 1860, 12 Stat. 1129, have already been paid for the right of way granted to the Leavenworth Company and they and their successors in title have no claim of any kind to the lands in question. See Art. 3 of Delaware Treaty of 1860; act of July 1, 1862, *supra;* act of July 13, 1892, 27 Stat. 120, 126; *United States* v. *Un. Pac. Ry. Co.*, 84 Fed. Rep. 1022; *United States* v. *Un. Pac. Ry. Co.*, 168 U. S. 505.

No right of way by adverse possession has been acquired by the appellants or any of them to any portion of the right of way granted to the Leavenworth Company under the act of July 1, 1862.

Congress alone was the judge of the width of the right of way required by the grantee corporation. *Nor. Pac. R. R. Co.* v. *Smith*, 171 U. S. 260, 275; *Nor. Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267, 272.

Equity has jurisdiction to protect a railroad company in the use and enjoyment of its right of way. *Louis. & Nash. R. Co.* v. *Smith*, 128 Fed. Rep. 1; *Cairo, V. & C. Ry. Co.* v. *Brevoort*, 62 Fed. Rep. 129; *Pennsylvania R. R. Co.* v. *Freeport Borough*, 138 Pa. St. 91.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The ultimate question to be decided on this appeal is, whether the appellee, the Union Pacific Railroad Company, has a right of way 400 feet in width across certain lands in the State of Kansas, formerly within the Delaware

Diminished Indian Reservation. The facts out of which the question arises are these:

By the treaty of 1829, 7 Stat. 327, with the Delaware Indians it was provided that certain lands in the fork of the Kansas and Missouri rivers should be "conveyed and forever secured" to those Indians "as their permanent residence." By the treaty of May 6, 1854, 10 Stat. 1048, parts of the reservation so established were relinquished and the remainder retained for a "permanent home." Article 11 of this treaty declared that at the request of the Delawares the diminished reservation should be surveyed and each person or family assigned such portion as the principal men of the tribe should designate, the assignments to be uniform; and Art. 12 provided that railroad companies, when their lines of railroad necessarily passed through the diminished reservation, should have a right of way on payment of a just compensation. The treaty of May 30, 1860, 12 Stat. 1129, after reciting such a request as was contemplated by the preceding treaty, provided that 80 acres of the diminished reservation should be assigned and set apart for the exclusive use and benefit of each Delaware and his heirs; that the tracts assigned should not be alienable in fee, leased or otherwise disposed of, except to the United States or to other members of the tribe, and should be exempt from levy, taxation, sale or forfeiture until otherwise provided by Congress; and that if any Delaware should abandon the tract assigned to him the Secretary of the Interior should take such action in respect of its disposition as in his judgment might seem proper. Article 3 of this treaty gave to the Leavenworth, Pawnee & Western Railroad Company, a Kansas corporation, a preferred right to purchase the unassigned lands in the reservation, and declared: "It is also agreed that the said railroad company shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compen-

sation therefor, in money, to the respective parties whose lands are crossed by the line of railroad."

The act of July 1, 1862, 12 Stat. 489, c. 120, relating to the location, construction and maintenance of the Union Pacific and other railroads, authorized the Leavenworth, Pawnee & Western Railroad Company, before mentioned, to locate, construct and maintain a railroad from the Missouri river, at the mouth of the Kansas river in Kansas, to a connection with the Union Pacific Railroad on the 100th meridian of longitude in Nebraska, and granted to it, as also to other companies named in the act, a right of way in the following terms:

"SEC. 2. That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

Other portions of the act required the Leavenworth, Pawnee & Western Railroad Company to file with the Secretary of the Interior within six months after the date of the act an acceptance of its conditions and within two years after such date a map of the general route of its road, and to complete 100 miles, commencing at the mouth of the Kansas river, within two years after such acceptance, and 100 miles per year thereafter until completion; and made provision for an official examination and approval

of the completed road in sections of 40 consecutive miles. The company seasonably filed an acceptance of the conditions of the act and a map of the general route of its road showing that the route extended from the mouth of the Kansas river to and across the Delaware Diminished Reservation. That part of the road was constructed on that route and put into operation within two years from the date of the act, and was duly examined and approved by the proper officers of the United States. Under congressional authority the route for the remaining part of the road was subsequently changed so that the connection with the Union Pacific Railroad would be made at a point farther west than was originally intended, and the later construction conformed to this change, but this has no bearing here. The appellee, the Union Pacific Railroad Company, became in 1898, and now is, the successor in interest and title of the Leavenworth, Pawnee & Western Railroad Company.

By the treaty of July 4, 1866, 14 Stat. 793, provision was made for the removal of the Delawares from their home on the diminished reservation to lands secured for them in the Indian Territory, and for the sale by the United States of the lands in the reservation, whether held in common or assigned in severalty, with the qualification that assignees electing to dissolve their tribal relations and become citizens of the United States might retain the tracts assigned to them and ultimately receive patents in fee simple with power of alienation. On receiving payment for the lands sold the United States was to issue patents therefor to the purchaser or his assigns, and apply the proceeds to the benefit of the tribe or the assignees, depending upon whether the particular lands were held in common or had been assigned in severalty. The intended removal was effected, the reservation was extinguished, and the lands therein, including most of those assigned in severalty, were sold as intended.

The lands through which the asserted right of way here in controversy extends were within the diminished reservation at the date of the act of 1862, had then been assigned in severalty to individual Delawares under the treaty of 1860, were sold by the United States under the treaty of 1866, and are now claimed by the appellants through mesne conveyances under the patents issued to the purchaser at that sale. The railroad was located and constructed across these lands without the payment of any compensation for the right of way. But, so far as appears, no attempt was made by the tribe, the individual assignees, or the United States to prevent the location and construction, and no controversy arose between them and the railroad company, save as there was a dispute as to whether the assignees were entitled to compensation, and, if so, as to who should pay it. See *Grintner* v. *Kansas Pacific Railway Co.*, 23 Kansas, 642; Id. 659; *United States* v. *Union Pacific Railway Co.*, 168 U. S. 505. In 1892 Congress recognized the right of the assignees to be compensated for the right of way, and made an appropriation to pay them, accompanying it with a direction to the Attorney General to institute proceedings against the railroad company to compel it to reimburse the Government. See 27 Stat. 120, 126, c. 164; *United States* v. *Union Pacific Railway Co., supra.*

The Circuit Court and the Circuit Court of Appeals sustained the railroad company's claim to a right of way 400 feet in width, 168 Fed. Rep. 648, and the present owners of the tracts affected prosecute this appeal.

It was contended in the courts below, and the contention is repeated here, that the individual Indians to whom the lands were assigned in severalty obtained no better or different right in them than the tribe had in the lands held in common; in other words, that the right was one of possession or occupancy only, the United States remaining the real proprietor and having full power to terminate the

Indian right at will. But, without passing upon that contention, we think it may well be assumed for the purposes of this case that the assignees, although not possessing the legal title and not promised a conveyance of it, had something more than the ordinary right of possession or occupancy of tribal Indians in lands set apart for tribal use. We say this, because the right of the assignees, whatever it may have been, was acquired and held under the treaty of 1860, wherein it was agreed that the Leavenworth, Pawnee & Western Railroad Company should have a perpetual right of way over any of the lands assigned in severalty, on the payment of a just compensation to those whose lands were crossed by its railroad. It therefore is not as if Congress had undertaken to grant a right of way through these lands without either the assent of the assignees or any provision for compensating them. As respects these lands, the right-of-way section in the act of 1862 did not stand alone, but was to be taken in connection with the treaty provision. The two, together, meant that the right of way was granted, not merely by the United States, but with the assent of the Indian assignees, and that the latter were to be justly compensated. The only uncertainty, if any, introduced into the situation arose from the presence in the right-of-way section of the promise on the part of the United States that it would as rapidly as might be extinguish the Indian title to all lands required for the right of way. This seems to have given rise to a question, whether the United States was to bear the burden of extinguishing the title, as by compensating the Indians therefor, or only to assist in obtaining it, as by conducting negotiations with the Indians in respect of the compensation to be paid to them. But we are not here concerned with that question, because the right under the treaty to have the compensation seasonably ascertained and paid by whomsoever was liable therefor was not insisted upon. No steps to that end

were taken, but, on the contrary, the construction of the railroad was permitted to proceed and the road was completed and put into operation as a public highway at least three years before the lands were sold under the treaty of 1866.

But it is said that the right-of-way section was inapplicable because it was confined to "public lands," a term used to designate such lands as are subject to sale or other disposal under general laws. No doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense. We think that is the case here, first, because the provision in the same section, that the United States should extinguish as rapidly as might be the Indian title to all lands required for the right of way, implies that Indian lands as to which Congress properly could grant a right of way were intended to be included, and, second, because the section was so interpreted by the Executive Department charged with the administration of the act, as also of affairs pertaining to the Indians and public lands, and rights acquired thereunder ought not lightly to be disturbed after the lapse of so many years.

It results that the sole irregularity in respect of the acquisition of the right of way contemplated by the treaty provision and the statute, taken together, was the failure to make compensation therefor to the Indian assignees when the railroad was constructed or until after the lands had been sold for their benefit to the remote grantor of the appellants. The railroad was in existence and being operated across the land at the time of the sale, as ever since, and therefore there can be no claim that that or any subsequent purchase was made without notice of the right of way.

So, if the appellants be regarded as claiming under the Indian assignees, which is the most favorable view for the appellants, the case still falls within the general rule, that where a railroad company enters upon the land of another

and constructs a railroad thereover under a statute entitling it so to do on condition that compensation be made to the owner, and the latter permits the road to be constructed and put into operation without a compliance with that condition, a subsequent vendee of the owner takes the land subject to the burden of the right of way, and the right to exact payment therefor from the railroad company belongs to the owner at the time the company entered and constructed the road. *Roberts* v. *Northern Pacific Railroad Co.*, 158 U. S. 1, and cases cited.

At an early stage of the case it appears to have been contended that the appellants acquired title to parts of the right of way by adverse possession, but as the contention is expressly abandoned in the brief, evidently in view of the ruling in *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260; *Northern Pacific Railway Co.* v. *Townsend*, 190 U. S. 267, and *Northern Pacific Railway Co.* v. *Ely*, 197 U. S. 1, it need not be considered.

We conclude that the decree of the Circuit Court of Appeals was right.

Decree affirmed.